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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1925~~ 1926

No. ~~178~~ 179

HANOVER FIRE INSURANCE COMPANY, PLAINTIFF IN
ERROR,

vs.

PATRICK J. CARR, COUNTY TREASURER OF THE COUNTY
OF COOK, STATE OF ILLINOIS, ETC.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS

FILED JULY 24, 1925

(31,349)



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No. 626

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PATRICK J. CARR, COUNTY TREASURER OF THE COUNTY
OF COOK, STATE OF ILLINOIS, ETC.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS

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[Caption omitted]

[fol. 5]

IN SUPERIOR COURT OF COOK COUNTY

401,583

BILL OF COMPLAINT—Filed April 3, 1924

To the Honorable Judges of the Superior Court of Cook County, in chancery sitting:

The complainant, Hanover Fire Insurance Company, a corporation organized and existing under and by virtue of the laws of New York, brings its bill of complaint against the defendant, Patrick J. Carr, County Treasurer of Cook County, Illinois, and ex officio county collector of said Cook County, and respectfully represents and complains unto your Honors as follows:

(1) That the complainant was, on and prior to the 1st day of May, A. D. 1922, and ever since has been, and now is, a corporation organized and acting under and pursuant to the insurance laws of New York, and empowered by its charter and by the laws of said domicile to engage in the business of insurance as a fire, marine and inland navigation insurance company, as more particularly hereinafter set forth;

(2) That on and prior to the 1st day of May, A. D. 1922, and from said time to and including the 30th day of April, A. D. 1923, complainant was engaged in the transaction of the business of insurance in the State of Illinois as a foreign fire, marine and inland navigation insurance company, under a certificate of authority or [fol. 6] license granted to it by the Department of Trade and Commerce of the State of Illinois, issued pursuant to the statute in such case made and provided, under which certificate of authority or license it was authorized to, and it did during said time, and still does transact the business of insurance, and exercised such powers in insuring hazards and risks in the State of Illinois as fire, marine and inland navigation insurance companies are authorized, empowered and permitted to exercise in said State of Illinois;

That the complainant is subject to the provisions of an Act entitled, "An Act in Relation to the Taxation of non-resident Corporations, Companies and Associations for the Privilege of doing an Insurance Business in this State," approved June 28, 1919, in force July 1, 1919;

That ever since said Act of June 28, 1919, became effective, the complainant, pursuant to the provisions of said Statute, has paid "An annual State tax, for the privilege of doing an insurance business in this State, equal to two (2) per centum on the gross amount of premiums received during the preceding calendar year on contracts covering risks within this State," and has in all things com-

plied with each and every and all of the terms, conditions and provisions of said Act, prescribed by said Act and other Statutes of Illinois as conditions for the privilege of doing the business of fire, marine and inland navigation insurance in the State of Illinois by this complainant;

(3) That the complainant, during said time, was engaged in said business of insurance in the County of Cook and State of Illinois, [fol. 7] that during said time it maintained, in said County, agencies legally authorized to write, place or caused to be written or placed, policies of insurance and to charge, accept and receive premium receipts on behalf of the complainant therefor;

(4) That the complainant made no return of the net receipts of its agencies in Cook County to the Board of Assessors for the year A. D. 1923; that the Board of Assessors made no request or demand upon the complainant to return the amount of the net receipts of its agencies in Cook County for the year A. D. 1923 for the purpose of taxation; that the Board of Assessors made or cause to be made no inquiry or investigation to ascertain and determine the just, true and correct amount of the net receipts of the complainant subject to taxation in the Town of South Chicago, in the county of Cook, for the year A. D. 1923, but, on the contrary, wilfully, fraudulently and arbitrarily and without inquiry or investigation illegally found and determined that the amount of the net receipts of the complainant in the Town of South Chicago, in the County of Cook aforesaid, subject to taxation for the year A. D. 1923, amounted to the sum of \$135,000.00; that thereupon the Board of Assessors wilfully, fraudulently, arbitrarily and illegally set down in the column of its assessment books headed "Full Value" the amount of \$135,000.00 as the full value of the property of complainant subject to taxation; and also set down in another column headed "Assessed Value," one-half of said amount, namely, the amount of \$67,500.00; [fol. 8] that the Board of Assessors of Cook County, within the time required by law, completed the revision of the assessments for the year 1923 and appended to each of the assessment books for said year, in the form required by law, an affidavit signed by at least two of such assessors, stating, among other things, that the assessed value set down in the proper column opposite the several kinds and descriptions of property, including the assessment made against the property of complainant, as aforesaid, was a just and equal assessment of such property according to law; that thereupon, within the time limited by law, the Board of Assessors of Cook County delivered its assessment books, containing the assessments so made against the complainant aforesaid, together with the statements aforesaid, to the Board of Review of Cook County; that when said assessment had been so made by the Board of Assessors of Cook County, said Board of Assessors published and distributed to the taxpayers of the Town of South Chicago a list of the personal property assessments made in said town, stating, in said published list, the names of the persons and corporations assessed, together with the full cash value of the personal property of each set forth opposite their respective

names; that the full cash value, as so set opposite the name of complainant, was the amount of the "Full Value" as above set forth, that as part of the caption of said list, and applicable to all the persons and valuations thereon contained, was a statement as follows:

"Personal Property Assessment 1923 as listed by the Board of Assessors of Cook County, Tax will be assessed at one-half of cash valuation";

[fol. 9] (5) That the Board of Review of Cook County convened on or about the month of June, A. D. 1923, for the purpose of revising the assessment of property for the year A. D. 1923, and adjourned from day to day; that the said Board of Review about June, 1923, delivered to complainant a demand, in writing, to make certain returns to said Board, a copy of which demand is hereto attached and marked "Exhibit A" and made a part hereof;

That accompanying such demand was a copy of "Tax Commission Form No. 16," referred to in said demand, a copy of which is hereunto attached and marked "Exhibit B," and made a part hereof;

That complainant, in answer to such demand embodied in Exhibit A, did file with said Board of Review its answer and protest hereunto attached and made a part hereof and marked "Exhibit C";

That, thereupon a hearing was had before said Board of Review on said demand and said answer and protest; that during the course of said hearing the Board of Review advised counsel for the complainant and ruled that it, said Board of Review, construed and interpreted the decision of the Supreme Court of the State of Illinois in the case of *The People of the State of Illinois Ex Rel the City of Chicago, petitioner, vs. Charles V. Barrett, et al., respondents*, No. 13899, and reported in Vol. 309 of the official reports and decisions of the Supreme Court of Illinois at page 53 thereof, to require it, said Board of Review, to make an assessment against the full amount of net receipts of the complainant for the year A. D. 1923;

[fol. 10] That said Board of Review erroneously construed and interpreted said decision to deny to said Board of Review the power and authority to exercise its judgment and discretion as to reducing, debasing and equalizing net receipts so that said net receipts should be assessed, and so that taxes might be extended against such assessment, on the same basis or scheme or theory as that made against personal property, so that said net receipts should bear that proportion of the tax burden relatively which the said net receipts bore to the personal property within such tax jurisdiction;

That it construed and interpreted the said decision to require it, said Board of Review, to reverse, modify and set aside the assessment of net receipts of the complainant as so made by the Board of Assessors of Cook County, as aforesaid;

That said Board of Review construed and interpreted the decision of said court to deprive it, said Board of Review, of the power and authority to exercise its judgment and discretion as to the value of the net receipts of foreign fire insurance companies as compared with the value of other property, and the complainant charges that the Board of Review of Cook County refused to exercise its judg-

ment and discretion as to the value of net receipts of complainant, and did arbitrarily tax the net receipts of the complainant irrespective of the judgment of said Board as to the actual relative value thereof;

That although the complainant protested and objected that the Board of Review of Cook County was without power, jurisdiction or authority to revise, alter or amend any assessment made by the [fol. 11] the Board of Assessors of Cook County, and was without power, jurisdiction or authority to make any assessment against the complainant, for and on account of its net receipts, yet said protest and obligations being overruled and ignored by said Board, the complainant complained in writing to the Board of Review of Cook County that its net receipts had been and were erroneously and incorrectly assessed by the Board of Assessors; that the complainant appeared before said Board of Review and returned to said Board of Review the sum of \$90,823.95, as and for the amount of the net receipts of the complainant subject to taxation in the Town of South Chicago, in said County of Cook, that the complainant prayed said Board of Review to review and correct said assessment so made by the Board of Assessors so as to show that the full amount of the net receipts of complainant subject to taxation in said Town of South Chicago, in the County of Cook, amounted to the sum last above mentioned; that the return so made to the Board of Review, as aforesaid, is true, and correctly listed and exhibited the full, just, true and correct amount of the net receipts of complainant's agencies subject to taxation for the year ending April 30, A. D. 1923; that the Board of Review of Cook County wilfully, fraudulently, intentionally and arbitrarily ignored, overlooked and refused to consider or to act upon the return so made by the complainant to the Board of Review; that the Board of Review made or caused to be made, no inquiry or investigation to ascertain and determine the just, true and correct amount of the net receipts of the complainant subject to taxation, as aforesaid, but, on the contrary, wilfully, fraudulently, [fol. 12] arbitrarily, and without inquiry or investigation, illegally, found and determined that the amount of net receipts of the complainant was the amount as found and determined by the Board of Assessors and set down in the column headed "Full Value" as aforesaid; that thereupon the said Board of Review wilfully, fraudulently, arbitrarily and illegally entered an assessment on the assessment books of Cook County, in the town of South Chicago, against the complainant for the full amount of \$135,000.00, for and on account of net receipts as aforesaid, so wilfully, fraudulently, arbitrarily and illegally found and determined to be the full amount of the net receipts of the complainant as aforesaid; that the entry of the assessment against the complainant in the assessment books of the Town of South Chicago in said County of Cook is in the following form, to-wit:

"Name of company	Full value as fixed by board of assessors	Assessed value as fixed by board of assessors	Assessed value as fixed by board of review
Hamover Fire Insur- ance Company	\$135,000.00	\$67,500.00	\$135,000.00
			Supreme Court."

that the words "Supreme Court" in said book are written in red ink and mean and indicate that said assessment was not the judgment of said Board of Review, but made pursuant to the supposed mandate of the Supreme Court of the State of Illinois and not pursuant to its own judgment and discretion;

(6) That the Board of Review of Cook County within the time required by law, completed its work of assessment for the year A. D. [fol. 13] 1923 and attached to the assessment books containing the assessment against the complainant as aforesaid, an affidavit, which, among other things, stated that the assessed value set down in the proper column opposite the several kinds and description of property, was, in the opinion of the members of the Board, a just and equal assessment of such property for purposes of taxation according to law; that the assessment so made against the complainant was contained in the books containing the assessment of personal property; that one set of said books was, on or about the month of January, A. D. 1924, delivered to the County Clerk of Cook County, and now remains on file in his office;

(7) That the County Clerk of Cook County prepared the Collector's books for the year A. D. 1923 for the several towns, municipalities and taxing districts in said County; that said County Clerk extended on said Collector's books taxes at the rates per cent estimated and determined by him upon the valuation of the property in the respective towns, municipalities and taxing districts in said County of Cook that would produce within such towns, municipalities and taxing districts not less than the net amount of the several sums that were certified to him by the Auditor of Public Accounts, by the County Board of Cook County and by the proper authorities of the several towns municipalities and taxing districts within Cook County; that such rates per cent were extended by the County Clerk in said Collectors' books against the personal property and the net receipts of agencies of the complainant in the Town of South Chicago on the "full value" as found and entered on the assessment [fol. 14] books and as assessed by the Board of Review of Cook County, as aforesaid; that the County Clerk entered in the Collector's books for the Town of South Chicago in Cook County, an assessment against the complainant in the column of totals opposite its name in the Collector's books for the Town of South Chicago, in the County of Cook, the sum extended against the complainant on said assessment of "full value" as aforesaid;

(8) That the County Clerk of Cook County, on or after the 1st day of December, A. D. 1923, delivered to the County Treasurer of

Cook County, as ex officio collector of taxes in and for the towns located in the City of Chicago in said Cook County, including the Town of South Chicago, the books for the collection of taxes assessed and extended in and for the Town of South Chicago, to each of which was annexed a warrant under the hand of the County Clerk and the official seal of his office, commanding said collector to collect from the several persons named in said respective books the several sums charged in the column of totals opposite their respective names; that said warrant authorized said collector, in case any person named in such collector's books should neglect or refuse to pay the personal property tax therein charged opposite his name, to levy the same by distress and sale of the goods and chattels of such person; that the said County Treasurer of Cook County, as ex-officio collector of taxes in and for the towns, inclusive of the Town of South Chicago, located in the City of Chicago in said Cook County, before the filing of this bill, returned said tax books so received by him as aforesaid, to Patrick J. Carr, County Treasurer of Cook County, Illinois, and ex officio county collector of Cook County, Illinois, defendant [fol. 15] hereinafter named; that the taxes so assessed and extended against the complainant in the Town of South Chicago in Cook County were returned as unpaid and delinquent; that the collectors' books aforesaid, with the warrants attached as aforesaid, are now in the hands of the said Patrick J. Carr, County Treasurer of Cook County and ex-officio county collector of Cook County; that the said County Treasurer, as ex officio county collector as aforesaid, has the same powers and may proceed in the same manner for the collection of taxes as the several town collectors; that said Patrick J. Carr, as such county treasurer and ex officio collector of taxes of Cook County, has demanded of the complainant that it pay to him the amount of money so charged in the column of totals opposite its name in said collectors' books for the year A. D. 1923; that the total amount of taxes so charged on said collectors' books opposite the name of the complainant is the sum of \$10,678.50; that the said county treasurer, as ex officio county collector of Cook County, threatens, unless such payment is made, and unless restrained by this Honorable Court, he will levy the same by distress and sale of goods and chattels of the complainant;

(9) A. That the complainant is a corporation with capital stock and is authorized and empowered by its charter and articles of incorporation to insure those having insurable interest in (a) property, (whether upon land or water), (b) rents, and use and occupancy, (c) against hazards of fire, lightning, hail, tempest, earthquake, explosion (except upon steam boilers, and pipes, fly wheels, engines and machinery connected therewith or operated thereby), water, breakage, leakage, risks of ocean, lake, river, canal and inland [fol. 16] navigation, transportation, hazards of windstorms, tornadoes, cyclones, transportation and, in addition, upon automobiles or motor vehicles, against the hazards of theft and collision;

That complainant, during the year ending April 30, A. D. 1923, exercised its said corporate powers aforementioned in the State of Illinois, and collected and received premiums upon policies of in-

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insurance by it written through its said Cook County agencies, as aforesaid, and against the risks, as aforesaid, which said action of it, the complainant, was in nowise prohibited by the said State of Illinois and was consistent with the laws and policy of said State;

B. That the statutes of the State of Illinois provide for the chartering and organizing under the laws of said State of fire, marine and inland navigation insurance companies having their domicile in the State of Illinois (hereinafter referred to as domestic fire insurance companies), which said domestic fire insurance companies are authorized and empowered to organize as stock companies issuing capital stock to shareholders; that domestic fire insurance companies are authorized and empowered by the laws of the State of Illinois, and at all the times above mentioned were authorized and empowered, to make insurance on the same kinds and character of property and against the same hazards and risks as foreign fire insurance companies; that during all of said time, from the 1st day of May, A. D. 1922 to and including the 30th day of April, A. D. 1923, both domestic fire insurance companies and foreign fire insurance companies made insurance in the State of Illinois upon property against the hazards and risks, as aforesaid, and upon the same character of hazards and risks; that domestic fire insurance companies and foreign fire insurance companies charged, demanded and received, [fol. 17] and during all of said period mentioned did charge, demand and receive the same, or approximately the same, premium as foreign fire insurance companies charged, demanded and received for insurance upon the same property, or for the same kind, form, character, or type of hazard or risk; that foreign fire insurance companies are in direct competition with domestic fire insurance companies in making insurance upon property and against the hazards and risks hereinbefore stated;

C. That the statutes of the State of Illinois provide for the chartering and forming of companies with capital stock for the purpose of doing a casualty insurance business (which companies so organized and domiciled within this State are hereinafter referred to as domestic casualty insurance companies); and for the licensing of casualty insurance companies with a capital stock, organized under the laws of foreign States and Governments (hereinafter referred to as foreign casualty insurance companies) to transact the business of casualty insurance; that casualty insurance companies, both domestic and foreign, are authorized to, and do, in the State of Illinois, and during all of the period aforementioned did, within the said State, make insurance, among other things, upon automobiles or other motor vehicles, whether stationary or being operated under their own power, against all or any — the risks of fire, lightning, wind-storm, tornadoes, cyclones, explosions, hailstorms, transportation by land or by water, theft and collision; and did also make insurance, and still do, against loss or damage by water, caused by the breakage or leakage of sprinklers, pumps or other apparatus, water pipes, [fol. 18] plumbing or other fixtures erected, used, or put in position for the purpose of extinguishing fires; against damage, loss or injury resulting from any cause whatsoever from such sprinklers,

pumps or other apparatus erected, used, or put in position for the purpose of extinguishing fires; to make insurance upon growing crops, live stock or other property against loss or damage by lightning, windstorms, hailstorms, and cyclones;

That the powers so exercised and the authority so granted and the hazards so assumed by casualty insurance companies, domestic and foreign, are and each of such powers, authorizations and the insurance against such hazards respectively are and, during the period of one year prior to April 30, 1923, were exercised in the State of Illinois by complainant and by other foreign fire insurance companies; that casualty insurance companies, both domestic and foreign, do, and during said entire period mentioned did, charge, demand and receive the same, or approximately the same, premiums as foreign fire insurance companies do and did charge, demand and receive for a like amount of insurance upon like property and upon like hazards of the kind above mentioned; that foreign fire insurance companies, including the complainant, are, and during said period mentioned were, in direct competition with casualty insurance companies, both domestic and foreign, in the business of making insurance on property of the kind, form, character, types and hazards described in this clause of this paragraph:

That the aggregate amount of premiums received by complainant [fol. 19] and other foreign fire insurance companies for and on account of insuring property of the kind, form, and character and of the types and hazards in this clause of this paragraph referred to (and which may also be insured by casualty insurance companies, both domestic and foreign) constitutes a large and substantial percentage and part of its and their receipts in the State of Illinois and within the said County of Cook and Town of South Chicago collected by its and their respective agencies there being; that the aggregate amount of premiums received by casualty insurance companies, both domestic and foreign, for and on account of insuring property of the kind, form and character and of types and hazards in this paragraph referred to (and which may also be insured by foreign fire insurance companies) constitutes, and did constitute, a large and substantial percentage of the net receipts of casualty insurance companies, domestic and foreign, collected by their respective agencies established in the State of Illinois within the said County and town aforesaid; that during the year ending April 30, 1923, there were approximately 147 foreign casualty insurance companies licensed to do business in the State of Illinois, and during said time actually transacting business under said licenses within the State of Illinois; that among other things which may be insured, and during the said year ending April 30, 1923, were insured by foreign fire insurance companies and likewise insured by casualty insurance companies domestic and foreign, are and were automobiles or other motor vehicles, stationary or operated under their own power, which were insured respectively by foreign fire insurance [fol. 20] companies and casualty insurance companies, both domestic and foreign, against risks and hazards of windstorms, tornadoes, cyclones, explosions, hailstorms, transportation by land or by

water, theft or collision; that during said term there were approximately 950,000 automobiles and motor vehicles in the State of Illinois, and registered in the office of the Secretary of State under the provisions of the Motor Vehicle Law, a large part of which were located in the County of Cook and said Town of South Chicago; that foreign casualty insurance companies for the year A. D. 1923 received upwards of the sum of One Million Dollars in gross premiums for the insurance of automobiles and other motor vehicles against the risk of collision; that the complainant is informed and believes and so states the fact to be that foreign casualty companies doing business in the State of Illinois additionally received, during the year 1923, a sum not less than said sum so last mentioned in gross premiums for other types of insurance which they are so authorized to, and permitted to, and during said period of one year did, write by concurrent authority and power and by like permission of the State of Illinois so given to foreign casualty insurance [fol. 21] companies and so given to foreign fire insurance companies;

(10) That the complainant has paid all taxes assessed and extended against the complainant in the Town of South Chicago and in the County of Cook for the year A. D. 1923 for and on account of its property, chattels, goods, effects and credits under the general revenue laws of this State; that it has paid all taxes assessed and extended against it in said County of Cook for the year A. D. 1923 except upon its net receipts as aforesaid.

That the sole and only supposed ground or basis for the assessment, extension or collection of said tax against the complainant is Section 30 of an Act entitled:

"An act to incorporate and to govern fire, marine and inland navigation insurance companies doing business in the State of Illinois;"

approved and in force March 11, 1869, as amended by act approved May 31, 1879, in force July 1, 1879 which reads as follows:

"Every agent of any insurance company, incorporated by the authority of any other State or government, shall return to the proper officer of the county, town or municipality in which the agency is established, in the month of May, annually, the amount [fol. 22] of the net receipts of such agency for the preceding year, which shall be entered on the tax lists of the county, town and municipality, and subject to the same rate of taxation, for all purposes, state, county, town and municipal, that other personal property is subject to at the place where located; said tax to be in lieu of all town municipal licenses; and all laws and parts of laws inconsistent herewith are hereby repealed; Provided, that the provisions of this section shall not be construed to prohibit cities having an organized fire department from levying a tax, or license fee, not exceeding two per cent in accordance with the provisions of their respective char-

ters, on the gross receipts of such agency, to be applied exclusively to the support of the fire department of such city."

That in a certain action instituted upon the relation of the City of Chicago, a municipal corporation, petitioner by an action for a mandamus against the members of the Board of Review of Cook County, Illinois, which said cause was No. 13899 in the Supreme Court of Illinois, the opinion of the Court wherein is reported in Vol. 309 of the official reports of the decisions of the Supreme Court of Illinois at page 53 thereof, the said Court did undertake to review and consider the nature and character of the tax undertaken to be imposed by said Section 30, and in which proceeding the constitutionality of said Act was not involved, nor was the complainant, or any other foreign fire insurance company, any party thereto; that in the opinion in said cause rendered, the said Supreme Court did construe said Section 30 to be a business tax and not to be a privilege tax;

That in and by said decision and other decisions of the Supreme Court of Illinois the said Court did construe said Section 30 to impose a tax upon insurance when such insurance was, and is, written, placed and done by foreign fire insurance companies and to exempt from any tax thereunder insurance when written by any other insurers, whether domestic fire insurance companies, domestic or foreign [fol. 23] casualty insurance companies, by individuals, associations of individuals and groups of individuals or by groups of persons styling themselves Lloyds associations, or by any other entity whether natural or corporate;

(11) That said Section 30 affords no warrant or authority for the assessment, extension or collection of said tax and is illegal, unconstitutional and void and of no force and effect, in that it violates Section 1 of Article IX of the Constitution of the State of Illinois, in that it is not a tax by general law, uniform as to the class upon which it operates;

That it is in violation of Section 2 of Article II of the Constitution of the State of Illinois, because it deprives the complainant of liberty and deprives the complainant of property without due process of law;

(12) That said Section 30 affords no warrant or authority for the assessment, extension or collection of said tax and is illegal, unconstitutional, void, and of no force and effect, in that it violates Section 1 of Article XIV of the Constitution of the United States, in that it denies to complainant the equal protection of the laws, and deprives it of liberty and deprives it of property without due process of law;

(13) That said Section 30 affords no warrant or authority for the assessment, extension or collection of said tax, and is illegal, unconstitutional, void and of no force and effect, in that — violates Sections 9 and 10 of Article IX of the Constitution of the State of Illinois, in that it imposes a tax upon the inhabitants of a municipal corporation for local, corporate and municipal purposes;

[fol. 24] (14) That even though said Section 30 should be a valid and constitutional enactment, yet the action of the Board of Review of Cook County in entering upon the assessment books of Cook County, in the Town of South Chicago, an assessment against the complainant for the full amount as found by the Board of Review as aforesaid, or any amount of the net receipts of the complainant as aforesaid was illegal, in excess of its jurisdiction, arbitrary and wholly unauthorized by law.

(15) That even though the Board of Review had jurisdiction of the general subject matter of the assessment of the net receipts of foreign fire, marine and inland navigation insurance companies, and the revision of the assessments thereof made by the board of Assessors, yet the Board of Review of Cook County erroneously and willfully interpreted, construed, applied and administered said Section 30; that the assessment so made by the Board of Review of Cook County against the net receipts of the complainant is not equal and uniform with the assessment of a like amount of personal property set down under the column headed "full value" in the assessment books made up and certified by the Board of Review as aforesaid, nor subjected to the same rate of taxation that other personal property was there subjected to, but, on the contrary, the assessment so made by the Board of Review of Cook County against the net receipts of the complainant is one hundred per cent higher than the assessments made by the Board of Review of Cook County against other personal property in the County of Cook and set down in the assessment books under the column headed "full value"; that the action of the Board of Review of Cook County in assessing the net receipts of the complainant one hundred per cent higher than in [fol. 25] assessing other personal property in the County of Cook would require the complainant to pay one hundred per cent more in taxes for State, County, town and municipal purposes than that charged and assessed against other personal property in the County of Cook; that said action of the Board of Review of Cook County is unjust, arbitrary, illegal and fraudulent and contrary to and in violation of the terms and provisions of said Section 30; that said assessments so made by the Board of Review of Cook County upon the full amount of the net receipts of the complainant was, and is, as to all over and above fifty per cent of the amount of the net receipts of the complainant in the county of Cook, and in the Town of South Chicago, arbitrary, oppressive, discriminatory and without warrant or authority of law and denied, and denies, to the complainant the equal protection of the laws and was, and is, in violation of the fourteenth Amendment to the Constitution of the United States;

(16) That the assessment of net receipts, and the tax extended thereon, is unjust, oppressive and confiscatory, and is a gross fraud upon and wrong to and oppressive of the complainant, and imposes upon the complainant a greater proportion of the public burden that is borne by the owner of other personal property, while the assessments made upon personal property impress upon the property thus

assessed a less proportion of the burden of taxation than personal property should rightfully bear; that if said assessment of net receipts, and the tax extended thereon, should be sustained, it will be taking the property of the complainant without due process of law and the complainant will be bearing, in comparison with other [fol. 26] personal property, more than its just proportion of the public burden and the burden of taxation thus imposed upon the complainant will be unequal, all in violation of Section 2 of Article II of the Constitution of the State of Illinois, and of the Fourteenth Amendment to the Constitution of the United States;

(17) That from the year A. D. 1869 to and including the year A. D. 1922, all Boards of Assessors, County Treasurers in counties not under township organization as ex officio county assessors, all township assessors, all boards of review, all authorities throughout the State of Illinois, uniformly, invariably, consistently and without dissent construed said Section 30 to mean that the net receipts of foreign fire, marine and inland navigation insurance companies should be reduced, debased, equalized, assessed and taxed equally and uniformly with other personal property and upon the same basis as a like amount in value of personal property; that during said years the net receipts of foreign fire, marine and inland navigation insurance companies were assessed identically as in the case of personal property; that said construction was sanctioned, acquiesced in and approved by the state, by the various County Boards of the State, by the city councils and village boards of the respective cities and villages of the state, by town, road district, school, high school, sanitary district, park district authorities and by all the tax levying authorities of the State of Illinois during each, every and all of said years from 1869 down to and including the year A. D. 1922;

[fol. 27] That under and by virtue of Section 29 of the Act relating to fire, marine and inland navigation insurance companies, it is provided, in substance, that whenever the laws of the state of domicile of any foreign fire insurance company doing business in the State of Illinois shall require, of fire insurance companies chartered and organized under the laws of the State of Illinois, doing business in such other state, payment of taxes by Illinois insurance corporations greater than those required by the laws of Illinois from the insurance corporations of said other state, then the State of Illinois shall reciprocally require companies organized under the laws of such state to pay to the Department of trade and Commerce of Illinois for taxes an amount equal to the amount of charges and payments imposed by the laws of the domicile of the company; that ever since said Section 29 became effective and during each and every year from the date of its enactment up to and including the year A. D. 1922, the Auditor of Public Accounts, the Insurance Superintendent of the State of Illinois and the Department of Trade and Commerce of the State of Illinois, in settling the taxes to be paid by foreign fire insurance companies for and on account of said reciprocal tax, adjusted, settled, approved, confirmed and ratified the action of the

assessing and taxing officials throughout the State of Illinois in making assessments against the net receipts of foreign fire insurance companies upon an equality and uniformity with that assessed and extended against a like amount in value of personal property; that in most of the states of the domicile of companies to which such reciprocal provisions were applicable, the provisions of the laws of said states impose a tax of 2% upon their gross premium receipts and that the Department of trade and Commerce of the State of [fol. 28] Illinois exacted from such companies a tax equivalent to that exacted by the domiciliary state from Illinois companies at the rate obtaining in such domiciliary states (in most parts 2% on gross receipts) giving credit on such amount of the sum paid locally in Cook county and elsewhere by tax on net receipts and in giving credit to such foreign corporations upon the payment of such taxes for taxes paid in Cook county, did not credit upon such 2% of gross taxes the taxes upon net receipts on the basis of a tax upon 100% thereof but only upon the basis of a credit upon the basis of the equalized and assessed value in said respective counties, including Cook County, and exacted from such companies monies representing the difference between such tax so in each county derived by assessment under Section 30 and such 2% upon gross net receipts, aforesaid:

That with full knowledge of the construction so given to said Section 30 as aforesaid by said assessing and tax levying authorities during said years, the general assembly of this state sanctioned, approved and acquiesced in said construction in that said general assembly made no amendment to said section or to any other statutes in relation thereto; that said uniform and contemporaneous construction of said Section 30 and the unbroken and unchallenged practical construction thereof during all of said years from 1869 to and including the year 1922, has also met with the approval and had the sanction of the Courts of this state; that numerous cases have been instituted, maintained and prosecuted in the courts of this [fol. 29] state against foreign fire, marine and inland navigation insurance companies for and on account of said tax so assessed upon the same basis as that against personal property; that by a series of decisions of the courts of this state the said courts have construed said Section 30 to mean that the tax imposed therein and thereby is uniform with that imposed upon personal property; that the long, unbroken, contemporaneous, uniform and practical construction so placed upon said Section 30 by the administrative, executive, legislative and judicial departments of the State of Illinois has been acquiesced in and approved by the public; that the just, true and proper construction of said Section 30, is that given to it by the long, unbroken, contemporaneous, uniform and practical construction by the administrative, executive, legislative and judicial departments of the State of Illinois, as aforesaid;

(18) That if said Section 30 be a valid and constitutional enactment, then any assessment of net receipts made pursuant thereto, in order to be a true, just and valid assessment, should be on a basis

of equality and uniformity with that made and extended against other personal property in the Town of South Chicago and in the County of Cook; that if personal property, other than such net receipts, be reduced, debased and equalized systematically and intentionally and with the design that the same should thus be uniformly taxed upon such reduced, debased, and equalized value, then such general reduction, debasement and equalization should in like percentage and in like proportion, be applied to such net receipts as in case of other personal property before any sum or amount thereof was placed on the assessment books of the Town of South Chicago under the column headed "Full Value"; that the personal property of taxpayers generally throughout the County of Cook for the year [fol. 30] A. D. 1923, and for many years prior thereto, was and had been generally, intentionally, and systematically reduced, debased, equalized and set down in the column headed "full Value" at not exceeding sixty (60) per cent of its true actual and market value and one-half of the amount so set down in the column headed "Full Value" being set down in another column headed "Assessed Value" as provided by law; that the said Board of Review likewise, for the year 1923, did so systematically, intentionally, and uniformly debase, reduce and equalize the value of personal property in said County, excepting the net premium receipts of the complainant and other foreign fire insurance companies, which said net receipts were purposely, designedly, and intentionally left at their full value and at such amount entered in the assessment column, with the design, purpose and intent that complainant should be subjected to and should pay taxes thereon at a rate of taxation greater and different than that to which other personal property in said Town of South Chicago and said County of Cook was subjected; and that the said property of the complainant and its said net receipts should remain so subject to tax at its full value, and other personal property nevertheless be debased, reduced and equalized, as aforementioned; that the total amount of net receipts of the complainant subject to taxation under said Section 30 in the Town of South Chicago for the year ending April 30, A. D. 1923, was \$90,823.95; that after reducing, debasing and equalizing said amount of net receipts on the same basis as other personal property and after taking one-half the amount thereof as so reduced, debased and equalized as and for the assessed value, the amount of the assessed value of net receipts for which the complainant is liable to [fol. 31] taxation under said Section 30, if liable at all, is the sum of \$27,247.18, against which taxes should be extended by the County Clerk of Cook County; that the County Clerk extended the rate of \$7.91 against each \$100 of assessed value of personal property in said town of South Chicago for the year A. D. 1923; that the extension of taxes against any part of said net receipts, except against the last mentioned sum, was and is illegal, arbitrary, unjust, oppressive and discriminatory, unwarranted and unauthorized by law, not in proportion to the value and therefore not pursuant to said Section 30 and Section 1 of Article IX of the Constitution of Illinois, and the same denies the complainant the equal protection of the law and

deprives the complainant of its liberty and its property without due process of law in violation of Section 2 of Article II of the Constitution of the State of Illinois and of the Fourteenth Amendment to the Constitution of the United States;

(19) That the books for the collection of taxes in and for the County of Cook for the year A. D. 1923 are now in the hands of Patrick J. Carr, County Treasurer and ex-officio County collector of Cook County, Illinois, with warrants annexed thereto commanding him to collect from the complainant the amount so extended against the complainant for taxes for state, county, town and municipal purposes, as aforesaid, and that unless the same is paid to levy a distress warrant against the property and chattels of the complainant for the collection of the same:

[fol. 32] That this complainant has, from year to year, secured renewal of its license in the State of Illinois and has, through many years past, built up a large good will in the State of Illinois and has associated with it a large number of agents contained in the various counties of the state whose connection with it has resulted in a large and profitable business to this complainant, built up by the good will and esteem in which it is held by citizens of the State of Illinois desiring insurance; that it has large numbers of records containing information respecting its policyholders, the character and nature of their policies, and other records which, if it were deprived thereof and a distress levied thereon, would greatly impede its ability to carry on and conduct its business; that unless the collection of said tax be restrained, the officials of the State of Illinois having such matters in charge, namely, the Department of Trade and Commerce of the State of Illinois, will proceed because of claimed and supposed delinquency of complainant, in the premises, under and pursuant to the provisions of the laws of the State of Illinois to revoke, cancel and annul the license issued to this complainant, and refrain and refuse to issue a new license to this complainant when its present annual license expires, and thereby this complainant's business and good will, so built up by many years of business in the State of Illinois and expenditures of large sums of money in that behalf, will be completely destroyed and this complainant compelled to cease business in the State of Illinois and thereby lose its said good will and the value of its agency plants established at great cost and expense or, alternatively, to write business [fol. 33] and be subjected to penalties which are by law provided in the sum of \$500.00 for each violation, and the persons so having in charge the prosecution thereof do assert and claim that each policy by this complainant written would be a separate violation of the said laws and would impose upon this complainant a liability for penalty in the sum of \$500.00 for each policy so by it written; that the officers of the State of Illinois and particularly the Department of Trade and Commerce would, in such event, proceed to and would revoke the licenses of the agents of this complainant as agents licensed to do and carry on business of this complainant, and it and its agents be subjected to civil and criminal suits and prosecu-

tions and be subjected to prosecutions to recover many hundreds of thousands of dollars in penalties if this complainant undertook to or did proceed to continue with its business and affairs, and if it suspended its business, even for a short time, the value of its agency plants and good will, so built up through many years of straightforward dealing and by winning the confidence of the insuring public would be wholly lost to it and it would be subject to penalties imposed upon itself and its agents so excessive and huge in the aggregate as to result, in practical effect, in absolute prohibition against this complainant testing the validity of such tax payments otherwise than by means of this bill in equity without incurring the risk of vast and irreparable loss and damage which it could in no wise recover or recoup, that unless the collection of said taxes be restrained by this Court, the defendant will proceed to levy dis-[fol. 34] tress upon the property of this complainant and this complainant will become subjected to proceedings pursuant to non-payment of such tax bill consequent thereon, by way of actions for penalties and for revocation of the license of this complainant and its agents, and in the event that said restraining order be not so made and the defendant be not so enjoined this complainant will have its licenses revoked, as well as those of its agents doing business in this state, and this complainant will be subjected to repeated prosecutions, will be subjected to great publicity and notoriety and, in view of the fact that its business is peculiarly dependent upon the confidence and good will of the insuring public, the same would result in great and irreparable damage and injury to this complainant and its established business and good will in the State of Illinois, and particularly within the said County of Cook, and would greatly lessen and injure the flow of business otherwise accruing to this complainant in the ordinary course of its business, and the injury thereby arising would be incalculable in the amount of damages resulting to this complainant, and that the repeated prosecutions above referred to would constitute repeated trespasses under a void and unconstitutional law by the defendant and his agents and by the public prosecuting officers of the state, who would act at defendant's instance, as aforesaid, and that the defendant and his agents, and said prosecuting officers do not have or possess sufficient financial responsibility to answer adequately in damages and that [fol. 35] it would be wholly impossible to adequately and legally measure the amount and extent thereof.

That by reason of the facts aforesaid this complainant would suffer great and irreparable injury and damage unless this Honorable Court grants the relief herein prayed and this complainant has no plain, speedy and adequate remedy at law.

(20) Forasmuch, therefore, as this complainant is without remedy in the premises except in a court of equity, where such matters are properly cognizable and relievable, and to the end that the said Patrick J. Carr, County Treasurer of the County of Cook in the State of Illinois and ex officio county collector of Cook county in

the State of Illinois, who is made a party defendant to this bill, may make full, true and direct answer to the same, (but not under oath, the answer under oath being hereby expressly waived); that, upon the final hearing hereof;

(a) That the Court adjudge and decree that the assessments made against the net receipts of the complainant in the County of Cook and State of Illinois, and in the Town of South Chicago therein, and the taxes extended by the County Clerk of the County of Cook against such assessments, be declared void and held for naught and said assessments and said extension be set aside and that the defendant, his deputies, clerks, attorneys, agents and servants be restrained and perpetually enjoined from demanding, collecting or [fol. 36] receiving said taxes, or any part thereof, and from levying upon or seizing any of the goods and chattels of the complainant or selling the same, or in any manner attempting to enforce the payment of said taxes, or any part thereof;

(b) That, if a part only of said taxes should be found to be illegal and void, the relief hereinbefore prayed against the whole of said taxes may be granted as to so much thereof as shall be found by this court to be illegal and void, and in such case, the complainant stands ready and willing, and hereby offers to pay, so much of said taxes on account of net receipts as may be held by this court to be legal and owing;

(c) That the complainant may have such other and further relief in the premises as may be equitable and to your Honors may seem meet.

(21) May it please Your Honors to grant the writ of summons in chancery, directed to the Sheriff of said County of Cook commanding him that he summon the defendant, Patrick J. Carr, County Treasurer of the County of Cook in the State of Illinois, and ex officio county collector of Cook County in the State of Illinois to appear before the said Court on the first day of the next May Term thereof, to be held at the Court House in Chicago, in the county aforesaid, then and there to answer this bill.

[fol. 37] (22) And may it please the Court to grant unto your orator the people's writ of injunction to be directed to the said Patrick J. Carr, County Treasurer of the County of Cook and State of Illinois and ex officio county collector of Cook County in the State of Illinois, restraining him, his deputies, clerks, attorneys, agents, and servants from demanding, collecting or receiving of and from the complainant the sum of \$10,678.50, or any part thereof, extended against the complainant as taxes on its net receipts in the County of Cook and State of Illinois, and in the towns, municipalities and taxing districts therein, for the year A. D. 1923 until the further order of this court.

And your orator will ever pray, etc.

Hanover Fire Insurance Company, by Bates, Hicks & Folonie,
Charles E. Woodward, Oscar B. Ryon, Silber, Isaacs, Silber
& Woley, It's Solicitors. Bates, Hicks & Folonie, Charles
E. Woodward, Oscar B. Ryon, Silber, Isaacs, Silber &
Woley, Solicitors for Complainant.

[fol. 38] *Duly sworn to by W. K. Maxwell. Jurat omitted in printing.*

[fol. 39] EXHIBIT A TO BILL OF COMPLAINT

Board of Review of Cook County, Room 337, Third Floor, County
Building, Chicago, Ill.

Telephone: Franklin 2000

P. A. Nash, Chairman; Charles V. Barrett, Edward R. Litzinger;
Stephen D. Griffin, Chief Clerk

To ——— and your agents in Cook County, Illinois:

1. Demand is made upon you and each of you that you make or cause to be made a return to this Board upon "Tax Commission Form" No. 16 of the net receipts of each and every one of your agencies in Cook County for the year ending April 30th, 1923, and that this return be made and filed with this Board on or before the — day of July, 1923.

2. Demand is also made upon you and each of you that you make or cause to be made like returns to this Board of Review upon "Tax Commission Form No. 16" of the net receipts of each and every one of your agencies in Cook County for each of the years ending April 30, 1920, 1921, and April 30, 1922, and that these returns be made and filed with this Board on or before the 7th day of Nov. 1923. (Copies of "Tax Commission Form No. 16" are herewith enclosed. All additional copies required will be furnished upon application to this office.)

[fol. 40] 3. Demand is also made upon you and each of you that you make or cause to be made similar returns to this Board of Review of the net receipts of each and every one of your agencies in Cook County for each and every one if the years since March 11th, 1869, ending April 30th, or for each and every year since you entered the State and commenced business in Cook County up to and including the year ending April 30, 1919. These returns are to me made and filed with this Board on or before the 7th day of November, 1923.

Directions Referring to Demand "3"

1. Gross receipts of an agency is the total amount of all premiums or other compensation received during the year for all insurance of every kind, written by or through said agency, wherever the risk is located, less premiums returned upon cancelled policies.

2. Net receipts is the balance remaining after deducting from the gross premiums or receipts of the agency the operating expenses of the agency.

3. The returns of a Company must show for each of its agencies for the year:

(a) Total amount of premiums or compensation received, specifying the different classes from which received;

(b) Amounts returned on cancelled policies; (balance A less B being gross receipts of agency).

(c) Specifying operating expenses of each agency in detail showing items claimed as included in operating expenses;

(d) Specifying other deductions claimed, if any; and

(e) Finally show net receipts resulting.

Return must be verified.

[fol. 41] Companies that are mergers or combinations of other companies must file returns for such other individual companies for the years prior to the merger or combination.

Board of Review, by Stephen D. Griffin, Chief Clerk.

EXHIBIT B TO BILL OF COMPLAINT

Tax Commission Form No. 16

Form to be Used in Making the Return of Net Receipts Required by Section 30 of the Act of March 11, 1869, Relating to Fire, Marine, and Inland Navigation Insurance, as Amended 1879

Individual Return Form

Return of Net Receipts for the Year Ending April 30, 1923, by the
 ——— Agency, Located at ——— County, Illinois, for the ———
 of ———

The return must comply with the following instructions:

An individual return must be filled out for every agent issuing or countersigning policies, including any general agent who issues or countersigns policies of reinsurance or direct insurance, or who has paid taxes in bulk for other agents during the year. A general agent or home officer may fill in the individual returns as attorney for the agents, but must not in so doing introduce items or transactions not administered by the local agent and shown on his books, such as reinsurance, overhead and supervisory expense, etc.

Gross Premiums less Total Operating Expenses.....
Gross Premiums less Total Op. Exp. and Returned Pre- miums
(Claimed Deductions)
.....
.....
.....
.....
Total claimed deductions.....
Net receipts for which liability is acknowledged...
Subscribed and sworn to before me this — day of —, A. D. 1923. — — —.	

[fol. 44] EXHIBIT C TO BILL OF COMPLAINT

Before the Board of Review of Cook County, A. D. 1923

Answer and Protest to demands for returns upon Tax Commission form No. 16 for period March 11, 1869, to April 30, 1922, and like demand respecting period of one year ending April 30, 1923

To the Board of Review of Cook County, Chicago, Illinois.

GENTLEMEN: Replying to written demand made by you under act respecting "Fire, Marine and Inland Navigation" insurers, to make report to the Board of Review upon tax commission form No. 16, respecting each and every one of its agencies in Cook County for the respective periods in the demand recited, we beg to reply:

I

Demand Number 1, requiring return upon Tax Commission form No. 16 for the year ending April 30, 1923, of net receipts of all agencies in Cook County

1. Section 30 of the Insurance Act is void, discriminatory, and unconstitutional. This being the only supposed warrant of law under which you purport to act, there is no valid provision of law for tax on net receipts or requirement for return thereof.

2. Such section is discriminatory and void, in that, as construed by the Supreme Court of this State, it imposes a tax upon foreign fire insurers admitted to do business in this state while exempting domestic fire companies and casualty companies writing like risks [fol. 45] from such "business tax."

3. The Insurance Act grants no jurisdiction or power to the Tax Commission, and the statutes creative of such body delegate no power

to such commission respecting supervision of return of net premium receipts by fire insurers or their agents.

4. The Tax Commission has no supervision, power or control over the enforcement of Section 30 of the Insurance Act, nor is it given any jurisdiction by law to in anywise intervene in or take any part in the making of such returns which are not taxes on personal or real property, or any subject matter entrusted to Tax Commission supervision.

5. There is no provision of law requiring a return by insurance corporations under Section 30 of the Insurance Statutes of Illinois. Provision is made that agents shall make such return, and the duty (as distinguished from the power) is that of such agents.

6. There is no provision in the laws of Illinois providing for the return of net receipts to the Board of Review, and such return is required to be made to the proper officers of the county, town or municipality in which the agency is established, and such proper officer is the one making tax assessment and not the body having the same for review. The undersigned has duly made returns to Cook County Board of Assessors (which is the lawful assessing body) for the years mentioned in demands I, II and III, which returns have been accepted, and the power of the Board of Review to require any further return is denied.

[fol. 46] 7. Objection is made to any requirement to make any return (required to be made to any proper office) upon Form 16 for the reason that such form requires return of receipts inclusive of extra-state risks and in so requiring is oppressive and is an unlawful interference with interstate commerce, in requiring return or burdening with a tax, insurance upon property engaged in interstate commerce, such as railroad cars, vessels, property located in other states, vehicles engaged in interstate commerce and like properties insured by the undersigned.

8. Form 16 is unreasonable in that the same provides that items of expense must be "actual without the use of computed percentages," whereas the overhead of the undersigned, properly attributable to respective agencies by way of home office salaries, field supervisory expense, home office rents, taxes, printing and like overhead, can not be allocated to such agencies without computing the percentage properly to be assigned to them. In eliminating allocation and providing that the same may not be used or employed, such tax commission form is unlawful, oppressive and unfair.

9. The provision that only taxes paid by a general agent for other agents may be pro rated, thereby eliminating taxes paid by officials, managers and other persons connected with the insurers in positions other than that of general agent is oppressive and unlawful. A great portion of their taxes are paid through persons other than general agents—through managers and officials and, therefore, if such form be followed and used, the insurers would

be required to lose the credit on account of such taxes so paid through means other than the general agent, and would be required to pay upon gross premiums and not on net premiums.

[fol. 47] 10. The provision of said form that dues paid to bureaus or associations of underwriters must not be included in operating expenses is unreasonable and void, and the undersigned insurers state that as part of the conduct of their business it is essential that they maintain, and they do maintain bureau or associations to minimize and eliminate great and extraordinary fire hazards and for inspection and classification of hazards. To avoid ruinous duplication of effort and expense these activities are conducted by bureaus securing necessary inspections and maps made available to subscribing companies. Fire insurers, including the undersigned, do contribute to bureaus and associations making inspection of risks as a part of the proper conduct and investigation into the rates properly to be charged and recommendations to persons seeking insurance as to the elimination of hazards whereby they may reduce their rates of premium; and the undersigned state that to exclude such proper and ordinary expense from its operating expenses operates to deprive the undersigned of an allowance reasonable, proper and necessary in the operation of their business and without which the same could not be conducted except at greatly increased expense and consequent increase in rates of premium, and the expenses of which are only a small part of the saving to the public which the undersigned and the insurers are enabled to make; that to prohibit the undersigned from taking credit therefor operates to make the result obtained in eliminating the same a gross receipt and not a true net receipt. Some of the activities in question are comparable to the furnishing of credit information by Dunn or Bradstreet to mercantile companies.

[fol. 48] 11. The demands and directions in said blank requiring return of explosion insurance is improper, arbitrary and unlawful in that the undersigned is not bound to report or to pay any tax upon such portion of its business as arises out of insurance against the hazard of explosion because when said Section 30 of the Insurance Statutes was enacted the only risks to which the same could be applied under existing statutes were those of fire and marine and inland navigation, and no other hazards.

The right to insure against damage by explosion was given specifically by the Act of May 21, 1919, which amended Section 1 of the Insurance Act so as to authorize explosion insurance. There was no provision, however, in this enactment in anywise affecting Section 30, and it does not purport to amend that section, or in any way enlarge its intent.

12. By special enactment of the Legislature of the State of Illinois permission to make insurance upon explosions has been given to both fire and casualty insurers, but the existing statute requiring a payment of a percentage upon net receipts was in nowise amended or rendered applicable thereto; that in requirement of Form 16

same requires report by the undersigned upon net receipts including explosion insurance, and the law exempts casualty insurers and domestic insurers from any requirement to pay upon such net receipts or upon explosion insurance; that such construction of the statute as would make the undersigned amenable to tax thereon while exempting others having like risks renders and makes the same invalid.

[fol. 49] 13. The requirement that classification report shall be inclusive of use and occupancy insurance is improper and unlawful for like reasons.

14. Said form is unlawful and calls for information not proper to be produced respecting which no tax could be assessed or levied, in that the same calls for report of sprinkler leakage insurance, whereas such form of insurance is not within the provisions of the net receipts contemplated by Section 30 of the Insurance Statutes and further because such type of insurance is likewise written by casualty insurers and domestic fire insurers. That to impose the burden of reporting and paying a tax thereon upon the undersigned and not upon casualty insurers and domestic fire insurers is oppressive, unlawful and discriminatory.

15. Said form is improper and calls for information not proper to be exacted in that the same requires report respecting tornado premiums, whereas the provision respecting insurance against tornadoes was enacted in 1881 and subsequent to the enactment of said Section 30, and said Section 30 was in no wise reenacted nor made upon applicable to such enlarged authorization of insurance writing.

16. Said form is improper and unlawful respecting "auto premiums," thereby meaning and designing to exact information respecting insurance of automobiles or motor vehicles, whereas the provision of law authorizing the undersigned to insure such motor vehicles was enacted in the year 1912, as a separate and distinct enactment, and in nowise made applicable to or related to said Section 30 requiring report or payment upon the net receipts.

[fol. 50] 17. Further, the undersigned state that such automobile insurance in all forms is written by domestic fire insurers, and particularly as to liabilities of theft and collision is likewise written by casualty insurers and they are by law authorized to write the same and said statute if it requires the payment by the undersigned upon the net receipts derived from such source, whereas casualty insurers and domestic fire companies are exempted entirely from the provisions of said Section 30, is unjust, unlawful and discriminatory.

18. Said form is improper and unlawful in requiring return of *hail* premiums, and parcel post and mail and package premiums, and the undersigned state that the same are subject to all of the objections aforementioned in previous subdivisions.

19. Said form in its itemized statement in operating expenses excludes entirely overhead such as federal taxes, premium tax, gen-

eral taxes, expenses of bureaus and associations, inspections, maps and printing, advertising, telephone and telegraph tolls, etc., but in such itemized statement limits the undersigned to operating expenses of a much more limited kind and excluding entirely from consideration overhead and while purporting to be a return of net receipts in fact requires a return of gross receipts.

Said form is unlawful in that the same contains provision that the net receipts as so required to be calculated according to said form are recited therein in the printed portion to be "net receipts for which liability is acknowledged," and the undersigned states that it is not bound by law to acknowledge liability nor to foreclose itself from any claim that net receipts as by such statement required to [fols. 51-60] be computed are not in fact its net receipts, nor is it by law required to acknowledge liability or declare a construction of law contrary to its belief and understanding.

Said section 30, as well as your demand are contrary to the Fourteenth Amendment of the Constitution of the United States in that they abridge the privileges of the undersigned, which is a citizen of the United States, and deprives it of property without due process of law, and denies it the equal protection of the laws.

Said Section 30 and said Section 29 and said demands are in contravention of Article 2 of Section 2 of the Constitution of the State of Illinois, and of Article 9, Section 1 of the Constitution of the State of Illinois.

The Act under which you purport to act has been repealed and superseded.

Wherefore, with all due respect to the members of this Honorable Board and due deference to its lawful powers, the undersigned must respectfully decline to further comply with your demands.

(Portions of protest relating to demands II and III omitted.)

[fol. 61] IN SUPERIOR COURT OF COOK COUNTY

In Chancery. No. 401,583

HANOVER FIRE INSURANCE COMPANY

vs.

PATRICK J. CARR, County Treasurer, etc.

ANSWER—Filed June 10, 1924

This defendant, now and at all times hereafter, saving and reserving unto himself all and all manner of benefit of exception which can or may be had or taken to the many errors, uncertainties [fol. 62] and other imperfections in said bill of complaint con-

tained, for answer thereunto or unto so much and to such parts thereof as he is advised it is material or necessary for him to make answer unto, answering says:

1. This defendant admits the matters and things alleged and set forth in paragraphs (1), (2) and (3) of the complainant's bill.

(2) This defendant denies that the Board of Assessors of Cook County made no request or demand upon the complainant to return the amount of the net receipts of its agency in Cook County for the year A. D. 1923 for the purpose of taxation, or that said Board of Assessors made or caused to be made no inquiry or investigation to ascertain and determine the just, true and correct amount of the net receipts of complainant subject to taxation in the town of South Chicago, in the County of Cook for the year A. D. 1923, or that said Board of Assessors willfully, fraudulently and arbitrarily, and without inquiry or investigation, illegally found and determined that the amount of the net receipts of complainant in the town of South Chicago, in the County of Cook, aforesaid, subject to taxation for the year A. D. 1923, amounted to the sum of \$135,000, or that said Board of Assessors willfully, fraudulently, arbitrarily or illegally set down in the column of its assessment books headed "Full Value," the amount of \$135,000 as the full value of the property of complainant subject to taxation, or that it willfully, fraudulently, arbitrarily or illegally set down in another column headed "Assessed Value," one-half of said amount, namely, the amount of \$67,500.

[fol. 63] 3. This defendant admits that the Board of Assessors found and determined that the amount of the net receipts of complainant in the town of South Chicago, in the County of Cook aforesaid, subject to taxation for the year A. D. 1923, amounted to the sum of \$135,000; that thereupon the said Board of Assessors set down in the column of its assessment books headed "Full Value," the amount of \$135,000 as the full value of the property of complainant subject to taxation; and also set down in another column headed "Assessed Value," one-half of said amount, namely, the amount of \$67,500.

4. This defendant admits that the other matters and things alleged in paragraph (4) of the complainant's bill, excepting those allegations which this defendant has in paragraph 2 of this answer denied.

5. This defendant admits that the Board of Review of Cook County convened on or about the month of June, A. D. 1923, for the purpose of revising the assessment of property for the year A. D. 1923, and adjourned from day to day; that the said Board of Review about June, 1923, delivered to complainant a demand in writing to make certain returns to said Board a copy of which demand is attached to the complainant's bill marked "Exhibit A" and made a part thereof; that accompanying such demand was a copy of "Tax Commission Form No. 16" referred to in said demand, a copy of

which is attached to said complainant's bill and marked "Exhibit B" and made a part thereof; that complainant, in answer to such demand embodied in Exhibit A, did file with said Board of Review its answer and protest, a copy of which is attached to said bill and made a part thereof and marked "Exhibit C"; that a hearing was [fol. 64] had before said Board of Review on said demand and said answer and protest; that during the course of said hearing said Board of Review advised counsel for the complainant and ruled that it, said Board of Review, construed and interpreted the decision of the Supreme Court of the State of Illinois in the case of *People of the State of Illinois, ex rel City of Chicago, petitioner, vs. Charles V. Barrett, et al., respondents*, No. 13897, and reported in Vol. 309 of the Official Reports and Decisions of the Supreme Court of Illinois at page 53 thereof, to require it, said Board of Review, to make an assessment against the full amount of the net receipts of the complainant for the year A. D. 1923; that said Board of Review construed and interpreted said decision to require it, said Board of Review to reverse, modify and set aside the assessment of net receipts of the complainant as so made by said Board of Assessors of Cook County, as aforesaid; that although the complainant protested and objected that the Board of Review of Cook County was without power, jurisdiction or authority to revise, alter or amend any assessment made by the Board of Assessors of Cook County and was without power, jurisdiction or authority to make any assessments against the complainant for and on account of its net receipts, yet said protest and objection being overruled and ignored by said Board, the complainant complained in writing to the said Board of Review [fol. 65] that its net receipts had been and were erroneously and incorrectly assessed by the Board of Assessors; that the complainant appeared before said Board of Review and returned to said Board of Review the sum of \$90,823.95 as and for the amount of the net receipts of the complainant subject to taxation in the town of South Chicago in said County of Cook; that the complainant prayed said Board of Review to review and correct said assessment so made by the Board of Assessors so as to show that the full amount of the net receipts of complainant subject to taxation in said town of South Chicago in said County of Cook amounted to the sum last above mentioned; that said Board of Review found and determined that the amount of net receipts of the complainant was the amount as found and determined by the said Board of Assessors and set down in the column headed "full value" as aforesaid; that thereupon said Board of Review entered an assessment on the assessment books of Cook County in the town of South Chicago against the complainant for the full amount of \$135,000 for and on account of the net receipts as aforesaid; and that the entry of the assessment against the complainant in the assessment books of said town of South Chicago in said County of Cook is in the form set forth in paragraph (5) of the complainant's bill.

6. This defendant denies all the allegations contained in paragraph (5) of the complainant's bill other than the allegations admitted by the preceding paragraph 5 of this answer.

[fol. 66] 7. This defendant admits the matters and things alleged in paragraph (6), (7), (8) and (9) of the complainant's bill.

8. This defendant admits the matters and things alleged in paragraph (10) of the complainant's bill, excepting that this defendant denies that the constitutionality of Section 30 of the act referred to in said paragraph was not involved in said action for a mandamus mentioned in said paragraph.

9. This defendant denies the allegations of paragraphs (11), (12), (13), (14), (15) and (16) of the complainant's bill.

10. This defendant denies that the construction of said Section 30 to mean that the net receipts of foreign fire, marine and inland navigation insurance companies should be reduced, debased, equalized, assessed and taxed equally and uniformly with other property and upon the same basis as a like amount in value of personal property was sanctioned, acquiesced in or approved by the state or by the various county boards of the state or by the city councils and village boards of the respective cities and villages of the state, or by town, road, district school, high school, sanitary district and park district authorities and by all tax levying authorities of the State of Illinois during each and every and all of said years from 1869 down to and including the year A. D. 1922, excepting insofar as acquiescence in such construction may be inferred from the fact that no steps have been taken by any public authorities to secure a judicial construction of said Section 30.

11. This defendant denies that the General Assembly of this State sanctioned, approved or acquiesced in any construction of said Section 30 otherwise than as such sanction, approval or acquiescence may be inferred from the fact that said General Assembly made no amendment to said section or to any other statutes in relation thereto.

[fol. 67] 12. This defendant denies that the construction of said Section 30 contended for by the complainant in said bill has ever met with the approval or sanction of the courts of this State or has been acquiesced in and approved by the public.

13. This defendant denies that the total amount of the net receipts of the complainant subject to taxation under said Section 30 in said town of South Chicago for the year ending April 30, 1923, was only \$90,823.95 and this defendant avers that said total net receipts were in fact \$135,000.

14. This defendant admits that the books for collection of taxes in and for the County of Cook for the year A. D. 1923 are now in the hands of this defendant as County Treasurer and ex-officio County Collector of Cook County, Illinois, with warrants annexed thereto commanding him to collect from the complainant the amount so extended against the complainant for taxes for state, county, town and municipal purposes and that unless the same is paid to levy

a distress warrant against the property and chattels of complainant for the collection of the same.

15. This defendant admits that complainant has from year to year secured renewal of its license in the State of Illinois and has for many years past built up a large good will in the State of Illinois and has associated with it a large number of agents contained in the various counties of the state whose connection with it has resulted in a large and profitable business to the complainant, built up by the good will and esteem in which it is held by citizens of the State [fol. 68] of Illinois desiring insurance; that it has large numbers of records containing information regarding its policy holders, the character and nature of their policies and other records which, if it were deprived thereof and a distress levied thereon, would greatly impede its ability to carry on and conduct its business, and that unless the complainant pays the said tax it may be subjected to some or all of the annoyances which the laws of this state permit any foreign fire insurance company to be subjected *in* in case of its failure to pay the taxes which the laws of this state require it to pay, all of which annoyances, however, the complainant can easily avoid by the payment of the tax assessed against it under protest and the beginning of a proper action at law to recover the same, which recovery will not be difficult, if said tax is, as complainant claims, illegal.

16. This defendant admits that if said Section 30 of the act entitled, "An act to incorporate and to govern fire, marine and inland navigation insurance companies doing business in the State of Illinois," approved and in force March 11, 1869, is in violation of any provisions of the Constitution of this state or of the 14th Amendment of the Constitution of the United States, the complainant is entitled to have declared void and held for naught the assessments complained of and to have this defendant, his deputies, clerks, attorneys, agents and servants restrained and perpetually enjoined from demanding, collecting or receiving the taxes mentioned in said bill, or any part thereof, and from levying upon or seizing any of the [fol. 69] goods and chattels of the complainant or selling the same, or in any manner attempting to enforce the payment of said taxes or any part thereof.

17. This defendant admits that if said Section 30 must be construed as not authorizing the extension of the tax mentioned in the bill upon the full amount of the complainant's net receipts the complainant is entitled to the relief it prays for as to so much of said taxes as the court may find to be illegal and void because of the refusal of the Board of Review of said Cook County to reduce the assessment of said receipts to the same extent that said Board of Review is required by law to reduce the assessments of personal property.

18. This defendant avers that said Board of Review of Cook County entered the assessment valuing the complainant's net re-

ceipts at \$135,000, being the full amount of said net receipts for said year ending April 30, A. D. 1923, as ascertained by said Board of Review in good faith and after due investigation and full opportunity afforded to said complainant to be heard and to present all of complainant's evidence to said Board of Review, and that said assessment of complainant's net receipts at \$135,000 expressed the honest judgment of said Board of Review as to the full amount of said net receipts for said year ending April 30, A. D. 1923.

19. This defendant avers that the complainant has not made or stated any such case in its said bill as entitles it to any relief in a court of equity against this defendant and avers that the remedy of the complainant, if any, on account of the matters alleged and set forth in its bill is full, adequate and complete at law and defendant prays the same advantage thereof as if he had demurred to said [fol. 70] bill of complaint for want of equity.

20. This defendant further says that all admissions made by him in this answer are made for the purposes of this suit only and are not to be treated as admissions by him in any other suit or proceeding either at law or in equity.

21. This defendant denies all and all manner of fraud, combination and confederacy wherewith he is by said bill charged without this that any other matter, cause or thing in said bill of complaint contained and not herein and hereby confessed and avoided, traversed or denied, is true to the knowledge or belief of this defendant; all of which matters and things this defendant is ready and willing to aver, maintain and prove as this honorable Court shall direct and this defendant prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

Patrick J. Carr, County Treasurer and ex Officio County Collector of Cook County, Illinois, by Robert E. Crowe, State's Attorney, His Solicitor. Francis X. Busch, Leon Hornstein, Hiram T. Gilbert, Wm. H. Duval, Bulkley, More & Tallmadge, of Counsel.

[fols. 71-73] *Duly sworn to by Patrick J. Carr. Jurat omitted in printing.*

[fol. 74] IN SUPERIOR COURT OF COOK COUNTY

General No. 401,583

HANOVER FIRE INSURANCE COMPANY, a Corporation, Complainant,

vs.

PATRICK J. CARR, County Treasurer of Cook County, in the State of Illinois, and ex Officio County Collector of Cook County, in the State of Illinois,

FINAL DECREE—July 12, 1924

And now on this 12th day of July, A. D. 1924, comes the complainant, Hanover Fire Insurance Company, a corporation, by Bates, Hicks & Folonie, Charles S. Dencen, Charles E. Woodward, Oscar B. Ryon, Silber, Isaac, Silber and Woley, and C. J. Doyle, its solicitors, and also comes the defendant, Patrick J. Carr, County Treasurer of Cook County in the State of Illinois and ex officio County Collector of Cook County in the State of Illinois, by Robert E. Crowe, State's Attorney in and for said Cook County, Francis X. Busch, Leon Hornstein, Hiram T. Gilbert, William H. Duval and Bulkley, More & Tallmadge, his solicitor:

And this cause coming on for hearing on the bill of complaint filed herein, the answer of the defendant thereto, the replication of the complainant to such answer, and the facts stipulated and the court having heard the arguments of counsel and now being fully advised herein doth find:

(1) That the court has jurisdiction of the parties and the subject matter of this cause:

(2) That the complainant was, on and prior to the 1st day of May, A. D. 1922, and ever since has been, and now is, a corporation [fol. 75] organized and acting under and pursuant to the insurance laws of New York, and empowered by its charter and by the laws of said domicile to engage in the business of insurance as a fire, marine and inland navigation insurance company, as more particularly hereinafter set forth:

(3) That on and prior to the 1st day of May, A. D. 1922, and from said time to and including the 30th day of April, A. D. 1923, complainant was engaged in the transaction of the business of insurance in the State of Illinois as a foreign fire, marine and inland navigation insurance company, under a certificate of authority or license granted to it by the Department of Trade and Commerce of the State of Illinois, issued pursuant to the statute in such case made and provided, under which certificate of authority or license it was authorized to, and it did during said time, and still does transact the business of insurance, and exercised such powers in insuring hazards and risks in the State of Illinois as fire, marine

and inland navigation insurance companies are authorized, empowered and permitted to exercise in said State of Illinois;

That the complainant is subject to the provisions of an Act entitled, "An Act in Relation to the Taxation of non-resident Corporations, Companies and Associations for the Privilege of doing an Insurance Business in this State," approved June 28, 1919, in force July 1, 1919;

That ever since said Act of June 28, 1919 became effective, the complainant, pursuant to the provisions of said statute, has paid "an annual State tax, for the privilege of doing an insurance business in this State, equal to two (2) per centum on the gross amount of premiums received during the preceding calendar year on contracts covering risks within this State," and has in all things complied with each and every and all of the terms, conditions and provisions of said Act;

[fol. 76] (4) That the complainant, during said time, was engaged in said business of insurance in the County of Cook and State of Illinois, that during said time it maintained, in said County, agencies legally authorized to write, place or caused to be written or placed, policies of insurance and to charge, accept and receive premium receipts on behalf of the complainant therefor;

(5) That the complainant, during the year ending April 30, A. D. 1923, had agencies established in the Town of South Chicago, County of Cook and State of Illinois and received through said agencies a large amount of receipts for and on account of premiums on insurance effected through said agencies; that the agents of the complainant whose agencies were established in said Town of South Chicago as aforesaid, made no return to the Board of Assessors of Cook County of the net receipts of any of said agencies of the complainant in and for the said Town of South Chicago during the month of May, A. D. 1923; that said Board of Assessors listed and assessed the net receipts of the said agencies of the complainant in the Town of South Chicago at the fair cash value of \$90,000.00 and added to such valuation a penalty in the sum of \$45,000.00; that thereupon the said Board of Assessors set down in the column of its assessment books headed "Full Value" the amount of \$135,000.00 as the full value of the net receipts of the agencies of the complainant subject to taxation in said Town of South Chicago, and also set down in another column headed "Assessed Value" one-half of said amount, namely, the amount of \$67,500.00 as and for the assessed value of the net receipts of the agencies of the complainant in said Town of South Chicago, subject to the same rate of taxation, for all purposes, state, county, town and municipal—that other personal property was subject to in said Town of South Chicago; that the Board of Assessors of Cook County, within the time required by law, completed the revision of the assessments for the year A. D. 1923 and appended to each of the assessment books for said year, in the form required by law, an affidavit signed by at [fols. 77 & 78] least two of such assessors, stating among other things,

that the assessed value set down in the proper column opposite the several kinds and descriptions of property, including the assessment made against the property of complainant, as aforesaid, was a just and equal assessment of such property according to law; that thereupon, within the time limited by law, the Board of Assessors of Cook County delivered its assessment books, containing the assessments so made against the complainant aforesaid, together with the statements aforesaid, to the Board of Review of Cook County; that when said assessment had been so made by the Board of Assessors of Cook County, said Board of Assessors published and distributed to the taxpayers of the Town of South Chicago a list of the personal property assessments made in said town, stating, in said published list, the names of the persons and corporations assessed, together with the full cash value of the personal property of each set forth opposite their respective names; that the full cash value, as so set opposite the name of complainant, was the amount of the "Full Value" as above set forth, that as part of the caption of said list, and applicable to all the persons and valuations thereon contained, was a statement as follows:

"Personal Property Assessment 1923 as listed by the Board of Assessors of Cook County, Tax will be assessed at one-half of cash valuation."

(6) That the Board of Review of Cook County convened on or about the month of June, A. D. 1923, for the purpose of revising the assessment of property for the year A. D. 1923, and adjourned from day to day; that the said Board of Review, about June A. D. 1923, delivered to complainant a demand, in writing, to make certain returns to said Board, a copy of which demand is in the words and figures following, to-wit:

Demand for tax return omitted. See Exhibit "A," printed side page 39 ante.

[fols. 79-81] That accompanying such demand was a copy of "Tax Commission Form No. 16," referred to in said demand, in the words and figures following, to-wit:

Tax return form No. 16 omitted. See Exhibit "B," printed side page 41 ante.

[fols. 82-88] That the complainant, in answer to such demand as aforesaid, did file with said Board of Review its answer and protest in the words and figures following, to-wit:

Answer and protest to demand for tax return omitted. See Exhibit "C," printed side page 44 ante.

[fol. 89] That, thereupon, a hearing was had before said Board of Review on said demand and said answer and protest; that during

the course of said hearing the Board of Review advised counsel for the complainant and ruled that it, said Board of Review, construed and interpreted the decision of the Supreme Court of the State of Illinois in the case of *The People of the State of Illinois ex rel the City of Chicago, petitioner, vs. Charles V. Barrett, et al., respondents*, No. 13899, and reported in Vol. 309 of the official reports and decisions of the Supreme Court of Illinois at page 53 thereof, to require it, said Board of Review, to make an assessment against the full amount of net receipts of the complainant for the year A. D. 1923.

[fol. 90] That said Board of Review construed and interpreted the said decision of the Supreme Court of the State of Illinois to require it, said Board of Review, to reverse, modify and set aside the assessment of net receipts of the complainant as so made by the Board of Assessors of Cook County as aforesaid; that the complainant protested and objected that the Board of Review was without power, jurisdiction and authority to make any assessment against the complainant for and on account of its net receipts and protested and objected that said Board of Review was without power, jurisdiction or authority to revise, alter or amend any assessment of net receipts made by the Board of Assessors of Cook County; that said protest and objections of the complainant were overruled by the Board of Review;

That thereupon the complainant complained in writing to said Board of Review that the assessment of net receipts of complainant as made and returned by the Board of Assessors of Cook County was excessive, erroneous and incorrect; that the complainant returned, under oath, to the Board of Review, the sum of \$90,823.95 as and for the amount of net receipts of the several agencies of the complainant in and for said Town of South Chicago for the year ending April 30, A. D. 1923 and subject to taxation in said Town of South Chicago; that the complainant prayed said Board of Review to review, revise and correct said assessment so made by the Board of Assessors of Cook County so that the complainant should be subject to taxation for and on account of net receipts in said Town of South Chicago of the true actual value of \$90,823.95, and further prayed said Board of Review to reduce, debase and equalize said amount of net receipts as aforesaid by the same ratio or percentage as other personal property was reduced, debased and equalized before setting down in the assessment books for the Town of South Chicago in the column headed "Full Value" any amount of said net receipts for taxation; that during the year ending April 30, A. D. 1923, there were upwards of 200 foreign fire, marine and inland navigation insurance companies having agencies established and receiving premium receipts in said Town of South Chicago; that said Board of Review made a demand on each such foreign fire, marine and inland navigation insurance company to file returns of net receipts as hereinabove set out; that practically all of said foreign fire, marine and land navigation insurance companies filed with said Board of Review an

answer and protest identical with the answer and protest filed by complainant; that as to each of such foreign fire, marine and inland navigation insurance companies said answer and protest was overruled; that practically all of such foreign fire, marine and inland navigation insurance companies thereupon returned under oath to said Board of Review the amount of the net receipts of their respective agencies established in said County of Cook for the year ending April 30, 1923; that, with few exceptions, and due to accident, oversight and inadvertence, the said Board of Review accepted, adopted and acted upon the returns so made to the Board of Review as aforesaid by the respective agents of said foreign fire, marine and inland navigation insurance companies, and adopted for taxation purposes the amount of net receipts as shown by said respective returns so made under oath to the Board of Review as aforesaid, and that such course of procedure was in accordance with the policy of said Board of Review; that pursuant to said policy, the said Board of Review found, fixed and determined the full amount of the net receipts of the complainant subject to taxation in the Town of South Chicago for the year ending April 30, A. D. 1923 to be in the sum of \$90,824.00; that through accident, inadvertence and oversight the said Board of Review entered, on the assessment books of the Town of South Chicago, an assessment against the complainant for the full amount of \$135,000.00, whereas, said Board of Review intended to enter, and but for said accident, oversight and inadvertence, would have entered, on the [fol. 92] assessment books of the Town of South Chicago an assessment against the complainant in the full amount of \$90,824.00 for and on account of the net receipts of the agencies of the complainant in said Town of South Chicago for the year ending April 30, A. D. 1923; That the entry of the assessment against the complainant in the assessment books of the Town of South Chicago in said County of Cook is in the following form, to-wit:

Name of company	Full value as fixed by board of assessors	Assessed value as fixed by board of assessors	Assessed value as fixed by board of review
Hanover Fire Insurance Company.	\$135,000	\$67,500	\$135,000.

Supreme Court;"

that the words "Supreme Court" in said books are written in red ink and mean and indicate that said assessment on the full amount of said net receipts was made in accordance with the rules of law laid down by the Supreme Court in the case of People of the State of Illinois ex rel. the City of Chicago vs. Charles V. Barrett et al., 309 Ill. 53; that the Board of Review intended to enter, and but for said accident, oversight and inadvertence, would have entered, in the column headed "Assessed Value as fixed by the Board of Review" the amount of \$90,824.00; that the Board of Review in-

tended to, and did, make an assessment against the complainant in the Town of South Chicago for and on account of net receipts as aforesaid in the full amount of \$90,824.00; the said amount being the full amount of net receipts returned under oath by the agencies of the complainant to the Board of Review, but through accident, oversight and inadvertence the full amount of said assessment appears in said assessment books in the sum of \$135,000.00; that the Board of Review did not intend to and did not, find and determine and enter in the assessment books for the Town of South Chicago one-half of said full amount as the assessed value for the purpose of taxation;

[fol. 93] (7) That the Board of Review of Cook County within the time required by law, completed its work of assessment for the year A. D. 1923 and attached to the assessment books containing the assessment against the complainant as aforesaid, an affidavit, which, among other things, stated that the assessed value set down in the proper column opposite the several kinds and description of property, was, in the opinion of the members of the Board, a just and equal assessment of such property for purposes of taxation according to law; that the assessment so made against the complainant was contained in the books containing the assessment of personal property; that one set of said books was, on or about the month of January, A. D. 1924, delivered to the County Clerk of Cook County, and now remains on file in his office;

(8) That the County Clerk of Cook County prepared the Collector's books for the year A. D. 1923 for the several towns, municipalities and taxing districts in said County; that said County Clerk extended on said Collector's books taxes at the rates per cent estimated and determined by him upon the valuation of the property in the respective towns, municipalities and taxing districts in said County of Cook that would produce within such towns, municipalities and taxing districts not less than the net amount of the several sums that were certified to him by the Auditor of Public Accounts, by the County Board of Cook County and by the proper authorities of the several towns, municipalities and taxing districts within Cook County; that such rates per cent were extended by the County Clerk in said Collectors' books against the personal property and the net receipts of agencies of the complainant in the Town of South Chicago on the "full value" as found and entered on the assessments books and as assessed by the Board of Review of Cook County, [fol. 94] as aforesaid; that the County Clerk entered in the Collector's books for the Town of South Chicago in Cook County, as assessment against the complainant in the column of totals opposite its name in the Collector's books for the Town of South Chicago, in the County of Cook, the sum extended against the complainant on said assessment of "full value" as aforesaid;

(9) That the County Clerk of Cook County, on or after the 1st day of December, A. D. 1923, delivered to the County Treasurer of Cook County, as ex officio collector of taxes in and for the towns

located in the City of Chicago in said Cook County, including the Town of South Chicago, the books for the collection of taxes assessed and extended in and for the Town of South Chicago, to each of which was annexed a warrant under the hand of the County Clerk and the official seal of his office, commanding said collector to collect from the several persons named in said respective books the several sums charged in the column of totals opposite their respective names; that said warrant authorized said collector, in case any person named in such collector's books should neglect or refuse to pay the personal property tax therein charged opposite his name, to levy the same by distress and sale of the goods and chattels of such person; that the said County Treasurer of Cook County, as ex officio collector of taxes in and for the towns, inclusive of the Town of South Chicago, located in the City of Chicago in said Cook County, before the filing of this bill, returned said tax books so received by him as aforesaid, to Patrick J. Carr, County Treasurer of Cook County, Illinois, and ex officio county collector of Cook County, Illinois, defendant hereinafter named; that the taxes so assessed and extended against the complainant in the Town of South Chicago in Cook County were returned as unpaid and delinquent; that the collectors' books aforesaid, with the warrants attached as aforesaid, are now in the hands of the said Patrick J. Carr, County treasurer of Cook County and ex officio county collector of Cook County; that the said County Treasurer, as ex officio county collector as aforesaid, has [fol. 95] the same powers and may proceed in the same manner for the collection of taxes as the several town collectors; that said Patrick J. Carr, as such county treasurer and ex officio collector of taxes of Cook County, has demanded of the complainant that it pay to him the amount of money so charged in the column of totals opposite its name in said collectors' books for the year A. D. 1923; that the total amount of taxes so charged on said collectors' books opposite the name of the complainant is the sum of \$10,-678.50;

(10) A. That the complainant is a corporation with capital stock and is authorized and empowered by its charter and articles of incorporation to insure those having insurable interest in (a) property, (whether upon land or water), (b) rents and use and occupancy (c) against hazards of fire, lightning, hail, tempest, earthquake, explosion (except upon steam boilers, and pipes, fly wheels, engines and machinery connected therewith or operated thereby), water, breakage, leakage, risks of ocean, lake, river, canal and inland navigation, transportation, hazards of windstorms, tornadoes, cyclones, transportation and, in addition, upon automobiles or motor vehicles, against the hazards of theft and collision;

That complainant, during the year ending April 30, A. D. 1923, exercised its said corporate powers aforementioned in the State of Illinois, and collected and received premiums upon policies of insurance by it written through its said Cook County agencies, as aforesaid, and against the risks, as aforesaid, which said action of

it, the complainant, was in nowise prohibited by the said State of Illinois and was consistent with the laws and policy of said State;

[fol. 93] B. That the statutes of the State of Illinois provide for the chartering and organizing under the laws of said State of fire, marine and inland navigation insurance companies having their domicile in the State of Illinois (hereinafter referred to as domestic fire insurance companies) which said domestic fire insurance companies are authorized and empowered to organize as stock companies issuing capital stock to shareholders; that domestic fire insurance companies are authorized and empowered by the laws of the State of Illinois, and at all the times above mentioned were authorized and empowered, to make insurance on the same kinds and character of property and against the same hazards and risks as foreign fire insurance companies; that during all of said time, from the 1st day of May, A. D. 1922 to and including the 30th day of April, A. D. 1923, both domestic fire insurance companies and foreign fire insurance companies made insurance in the State of Illinois upon property against the hazards and risks, as aforesaid, and upon the same character of hazards and risks; that domestic fire insurance companies and foreign fire insurance companies charged, demanded and received, and during all of said period mentioned did charge, demand and receive the same, or approximately the same, premium as foreign fire insurance companies charged, demanded and received for insurance upon the same property, or for the same kind, form, character, or type of hazard or risk; that foreign fire insurance companies are in direct competition with domestic fire insurance companies in making insurance upon property and against the hazards and risks hereinbefore stated;

C. That the statutes of the State of Illinois provide for the chartering and forming of companies with capital stock for the purpose of doing a casualty insurance business (which companies so organized and domiciled within this State are hereinafter referred to as domestic casualty insurance companies); and for the licensing of casualty insurance companies with a capital stock, organized under [fol. 97] the laws of foreign States and Governments (hereinafter referred to as foreign casualty insurance companies) to transact the business of casualty insurance; that casualty insurance companies, both domestic and foreign, are authorized to, and do, in the State of Illinois, and during all of the period aforementioned did, within the said State, make insurance, among other things, upon automobiles or other motor vehicles, whether stationary or being operated under their own power, against all or any the risks of fire, lightning, windstorm, tornadoes, cyclones, explosions, hailstorms, transportation by land or by water, theft and collision; and did also make insurance, and still do, against loss or damage by water, caused by the breakage or leakage of sprinklers, pumps or other apparatus, water pipes, plumbing or other fixtures erected, used, or put in position for the purpose of extinguishing fires; against damage, loss or injury resulting from any cause whatsoever from such sprinklers, pumps or other apparatus erected, used, or put in position for the purpose of extinguishing fires; to make insurance upon growing

crops, live stock or other property against loss or damage by lightning, windstorms, hailstorms, and cyclones;

That the powers so exercised and the authority so granted and the hazards so assumed by casualty insurance companies, domestic and foreign, are, and each of such powers, authorizations and the insurance against such hazards respectively are and, during the period of one year prior to April 30, 1923, were exercised in the State of Illinois by complainant and by other foreign fire insurance companies; that casualty insurance companies, both domestic and foreign, do, and during said entire period mentioned did, charge, demand and receive the same, or approximately the same, premiums as foreign fire insurance companies do and did charge, demand and receive for a like amount of insurance upon like property and upon like hazards of the kind above mentioned; that foreign fire insurance companies, including the complainant, are, and during said [fol. 98] period mentioned were, in direct competition with casualty insurance companies, both domestic and foreign, in the business of making insurance on property of the kind, form, character, types and hazards described in this clause of this paragraph;

That the aggregate amount of premiums received by complainant and other foreign fire insurance companies for and on account of insuring property of the kind, form, and character and of the types and hazards in this clause of this paragraph referred to (and which may also be insured by casualty insurance companies, both domestic and foreign) constitutes a large and substantial percentage and part of its and their receipts in the State of Illinois and within the said County of Cook and Town of South Chicago collected by its and their respective agencies there being; that the aggregate amount of premiums received by casualty insurance companies, both domestic and foreign, for and on account of insuring property of the kind, form and character and of types and hazards in this paragraph referred to (and which may also be insured by foreign fire insurance companies) constitutes, and did constitute, a large and substantial percentage of the net receipts of casualty insurance companies, domestic and foreign, collected by their respective agencies established in the State of Illinois within the said County and town aforesaid; that during the year ending April 30, 1923, there were approximately 147 foreign casualty insurance companies licensed to do business in the State of Illinois, and during said time actually transacting business under said licenses within the State of Illinois; that among other things which may be insured, and during the said year ending April 30, 1923, were insured by foreign fire insurance companies and likewise insured by casualty insurance companies domestic and foreign, are and were automobiles or other motor vehicles, stationary or operated under their own power, which were in-[fol. 99] sured respectively by foreign fire insurance companies and casualty insurance companies, both domestic and foreign, against risks and hazards of windstorms, tornadoes, cyclones, explosions, hailstorms, transportation by land or by water, theft or collision; that during said term there were approximately 950,000 automobiles and motor vehicles in the State of Illinois, and registered in the office of

the Secretary of State under the provisions of the Motor Vehicle Law, a large part of which were located in the County of Cook and said Town of South Chicago; that foreign casualty insurance companies for the year A. D. 1923 received upwards of the sum of One Million Dollars in gross premiums for the insurance of automobiles and other motor vehicles against the risk of collision; that the complainant is informed and believes and so states the fact to be that foreign casualty companies doing business in the State of Illinois additionally received, during the year 1923, a sum not less than said sum so last mentioned in gross premiums for other types of insurance which they are so authorized to, and permitted to, and during said period of one year, did, write by concurrent authority and power and by like permission of the State of Illinois so given to foreign casualty insurance companies and so given to foreign fire insurance companies;

D. That for many years prior to the year 1923, all the kinds of property and all the various hazards above mentioned have been insured, not only by fire insurance companies, foreign and domestic, and by casualty companies, foreign and domestic, but also by other insurers, and, during said entire period, said various types and kinds of insurance have been written and made upon the said various kinds, classes and characters of property upon the said various hazards mentioned, by individuals, and associations of individuals, and groups of individuals, and groups of persons styling themselves Lloyds Associations; and such persons, associations and aggregations of persons were wont and accustomed to, and did, write insurance, identical with foreign fire insurance companies, and in direct competition with such foreign insurance companies.

[fol. 100] (11) That the complainant has paid all taxes assessed and extended against the complainant in the Town of South Chicago and in the County of Cook for the year A. D. 1923 for and on account of its property, chattels, goods, effects and credits under the general revenue laws of this State; that it has paid all taxes assessed and extended against it in said County of Cook for the year A. D. 1923 except upon its net receipts as aforesaid;

That the sole and only supposed ground or basis for the assessment, extension or collection of said tax against the complainant is Section 30 of an Act entitled:

"An act to incorporate and to govern fire, marine and inland navigation insurance companies doing business in the State of Illinois;"

approved and in force March 11, 1869, as amended by act approved May 31, 1879, in force July 1, 1879 which reads as follows:

"Every agent of any insurance company, incorporated by the authority of any other State or government, shall return to the proper officer of the county, town or municipality in which the agency is established, in the month of May, annually, the amount of the net receipts of such agency for the preceding year, which

shall be entered on the tax lists of the county, town and municipality, and subject to the same rate of taxation, for all purposes, state, county, town and municipal that other personal property is subject to at the place where located; said tax to be in lieu of all town and municipal licenses; and all laws and parts of laws inconsistent herewith are hereby repealed; Provided, that the provisions of this section shall not be construed to prohibit cities having an organized fire department from levying a tax, or license fee, not exceeding two per cent in accordance with the provisions of their respective charters, on the gross receipts of such agency, to be applied exclusively to the support of the fire department of such city";

That in a certain action instituted upon the relation of the City [fol. 101] of Chicago, a municipal corporation, petitioner by an action for a mandamus against the members of the Board of Review of Cook County, Illinois, which said cause was No. 13899 in the Supreme Court of Illinois, the opinion of the Court wherein is reported in Vol. 309 of the official reports of the decisions of the Supreme Court of Illinois at page 53 thereof, the said Court did undertake to review and consider the nature and character of the tax undertaken to be imposed by said Section 30;

(12) That from the year A. D. 1869 to and including the year A. D. 1922 all boards of assessors and all other tax assessing bodies in the State of Illinois having to do with the assessments of net receipts of foreign fire, marine and inland navigation insurance companies, uniformly assessed said net receipts identically as in the case of personal property; that during said time the net receipts of foreign fire, marine and inland navigation insurance companies were reduced, debased, equalized, assessed and taxed equally and uniformly with other personal property and upon the same basis as a like amount in value of personal property; that during said time said assessing bodies and officers applied to the assessment of net receipts of foreign fire, marine and inland navigation insurance companies the same principles, practices, procedure and rules as were applied to the assessment of other personal property; that the practice of said assessing bodies or officers in assessing the net receipts of foreign fire, marine and inland navigation insurance companies in assessing net receipts on the same basis as other personal property, and in applying to such assessment the same principles, practices, procedure and rules as were applied to the assessment of other personal property, was uniform, unbroken, consistent and notorious; that neither the executive authorities of the State of Illinois, the various county boards of the State, the city councils and the village boards of the respective cities and villages of the State, the town, road district, school, high school, sanitary district, park district authorities, or any tax levying authority of the State of Illinois, or any citizen or tax payer of the State, or any or either of them, during any of said years from 1869 down to and including the year A. D. 1922 (except as hereinafter found in this decree) instituted, or caused

to be instituted, any judicial proceeding to challenge or question such method of assessment by such assessing authorities; that the construction of said Section 30 so adopted and applied by the various assessing officers as aforesaid from the year A. D. 1869 down to and including the year A. D. 1922 was first challenged and questioned in a certain action for a mandamus in the Supreme Court of the State of Illinois in a certain cause entitled *The People of the State of Illinois, ex rel the City of Chicago, petitioner vs. Charles V. Barrett, et al., respondents*, and known as No. 13899; that the opinion of the Supreme Court in said cause is reported in volume 309 of the official reports and decisions of the Supreme Court of Illinois, commencing at page 53 thereof, and that said opinion as published in said report is referred to and adopted herein as fully as if said opinion were herein fully recited;

That under and by virtue of Section 29 of the Act relating to fire, marine and inland navigation insurance companies, it is provided, in substance, that whenever the laws of the state of domicile of any foreign fire insurance company doing business in the State of Illinois shall require, or fire insurance companies chartered and organized under the laws of the State of Illinois, doing business in such other state, payment of taxes by Illinois insurance corporations greater than those required by the laws of Illinois from the insurance corporations of said other state, then the State of Illinois shall reciprocally require companies organized under the laws of such [fol. 103] state to pay to the Department of Trade and Commerce of Illinois for taxes an amount equal to the amount of charges and payments imposed by the laws of the domicile of the company; that ever since said Section 29 became effective and during each and every year from the date of its enactment up to and including the year A. D. 1922, the Auditor of Public Accounts, the Insurance Superintendent of the State of Illinois and the Department of Trade and Commerce of the State of Illinois, in settling the taxes to be paid by foreign fire insurance companies for and on account of said reciprocal tax, adjusted, settled, approved, confirmed and ratified the action of the assessing and taxing officials throughout the State of Illinois in making assessments against the net receipts of foreign insurance companies upon an equality and uniformity with that assessed and extended against a like amount in value of personal property; that in most of the states of the domicile of companies to which such reciprocal provisions were applicable, the provisions of the laws of said States impose a tax of 2% upon their gross premium receipts and that the Department of Trade and Commerce of the State of Illinois exacted from such companies a tax equivalent to that exacted by the domiciliary states (in most parts 2% on gross receipts) giving credit on such amount of the sum paid locally in Cook County and elsewhere by tax on net receipts and in giving credit to such foreign corporations upon the payment of such taxes for taxes paid in Cook County, did not credit upon such 2% of gross taxes the taxes upon net receipts on the basis of a tax upon 100% thereof but only the basis of a credit upon the basis of the equalized and assessed value in said respective counties, including

Cook County, and exacted from such companies moneys representing the difference between such tax so in each county derived by assessment under Section 30 and such 2% upon gross net receipts aforesaid;

That between the years A. D. 1869 and A. D. 1922 numerous cases have been instituted, prosecuted and maintained in the courts of this state against foreign fire, marine and inland navigation insurance companies for and on account of said tax so assessed upon [fol. 104] the same basis as that against personal property as aforesaid; that in none of said cases was the basis or method of said assessment challenged or questioned, except in the case of *The People ex rel the City of Chicago, petitioner, vs. Charles V. Barrett, et al., respondents*, as aforesaid;

(13) That the personal property of taxpayers generally throughout the County of Cook for the year A. D. 1923, and for many years prior thereto, was and had been generally, intentionally, and systematically reduced, debased, equalized and set down in the column headed "Full Value" at not exceeding sixty (60) per cent of its true actual and market value and one-half of the amount so set down in the column headed "Full Value" being set down in another column headed "Assessed Value" as provided by law; that the said Board of Review likewise, for the year 1923, did so systematically, intentionally, and uniformly debase, reduce and equalize the value of personal property in said County, excepting the net premium receipts of the complainant and other foreign fire, marine and inland navigation insurance companies, which said net receipts were purposely designedly, and intentionally left at their full value and at such amount entered in the assessment column;

That such action of the Board of Review in assessing the net receipts of foreign fire, marine and inland navigation insurance companies, including the assessment of the net receipts of the complainant at the true actual value thereof, was based upon the interpretation given by said Board of Review to the opinion of the Supreme Court of the State of Illinois in the said case of *The People ex rel the City of Chicago, petitioner, vs. Charles V. Barrett, et al., respondents*, 309 Ill. at page 53, as aforesaid;

[fol. 105] (14) That the County Clerk extended the rate of \$7.91 on each one hundred dollars of assessed value of personal property in said Town of South Chicago for the year A. D. 1923; that the amount extended as taxes on net receipts against complainant is the sum of \$10,678.50; that by reason of the facts hereinbefore found in this decree, and as a matter of law, all of the tax so extended by the County Clerk of Cook County against complainant in excess of the sum of \$7,184.18, is illegal, excessive and void; that if the true and actual value of said net receipts should have been debased, reduced and equalized as other personal property in said County of Cook, and the amount of net receipts as so debased, reduced and equalized set down in the column "Full Value", the amount so set down should have been \$54,494.00 and that if said net receipts should have been assessed on the assessment books in and

for the Town of South Chicago in the column headed "Assessed Value" the amount of said "Assessed value", after such reduction, debasement and equalization aforesaid, should have been \$27,247.00 and the tax thereon at the rate aforesaid should have been \$2,155.24; that the Board of Review correctly interpreted and applied the opinion of the Supreme Court of the State of Illinois in the said case of *The People ex rel the City of Chicago, petitioner, vs. Charles V. Barnett, et al.*, respondents, 309 Ill. at page 53, as aforesaid;

(15) That the books for the collection of taxes in and for the County of Cook for the year A. D. 1923 are now in the hands of Patrick J. Carr, County Treasurer and ex officio county collector of Cook County, Illinois, with warrants annexed thereto commanding him to collect from the complainant the amount so extended against the complainant for taxes for state, county, town and municipal purposes, as aforesaid, and that unless the same is paid to levy a distress warrant against the property and chattels of the complainant for the collection of the same;

[fol. 106] (16) That the complainant has, from year to year, secured renewal of its license in the State of Illinois, and has, through many years past, built up a large good will in the State of Illinois and has associated with it a large number of agents contained in the various counties of the state whose connection with it has resulted in a large and profitable business to the complainant, built up by the good will and esteem in which it is held by citizens of the State of Illinois desiring insurance; that it has large numbers of records containing information respecting its policyholders, the character and nature of their policies, and other records, which, if it were deprived thereof and a distress levied thereon, would greatly impede its ability to carry on and conduct its business; that if the complainant were deprived thereof its business would be irreparably damaged, its good will would be impaired and the value of its agency plants would be greatly and irreparably depreciated; that the complainant has no plain and adequate remedy at law;

(17) That said Section 30 is a valid, constitutional enactment and is not in violation of Section 1 of Article IX of the Constitution of the State of Illinois, nor of Section 2 of Article II of the Constitution of the State of Illinois, nor of Sections 9 and 10 of Article IX of the Constitution of the State of Illinois, nor of Section 1 of the 14th Amendment to the Constitution of the United States, nor of any or either of said sections, nor of any other provision of *of* the constitution either of the State of Illinois or of the United States;

(18) That the Board of Review of Cook County property and correctly construed and applied said Section 30 and in so construing and applying said Section 30 and assessing the net receipts of the complainant as aforesaid, did not violate any of the constitutional rights or protection of the complainant;

[fol. 107] (19) That by agreement between the parties the findings of fact embodied in this decree are to be treated as for the purposes of this suit only and are not to be given effect as evidence of the complainant's net receipts for any other year or years than the year ending April 30, A. D. 1923;

(20) That the equity of the bill is with the complainant as to so much of the taxes assessed and extended against the net receipts of the complainant in the town of South Chicago, Cook County and State of Illinois, for the year A. D. 1923, as exceeds the sum of \$7,184.18 and that the equity of the bill as to said sum of \$7,184.18, together with the costs, interest and penalties thereon, as authorized by law, is with the defendant.

Now, therefore, in consideration thereof, it is ordered, adjudged and decreed, and the court does order, adjudge and decree as follows:

(1) That the temporary injunction heretofore issued herein on the 7th day of June, A. D. 1924, be and the same is hereby dissolved.

(2) That the complainant, Hanover Fire Insurance Company, pay to the defendant, Patrick J. Carr, County Treasurer of Cook County, in the State of Illinois, and ex officio County Collector of said Cook County, the sum of \$7,184.18, together with the costs, interest and penalties thereon provided by law, and that upon such payment being made, said defendant be enjoined and restrained from demanding, collecting or receiving of or from the complainant any amount of taxes extended against the complainant as taxes on the net receipts of complainant in the Town of South Chicago for the year A. D. 1923, in excess of said sum of \$7,184.18 and the costs, interest and penalties thereon provided by law.

(3) That so much of said complainant's bill of complaint as relates to said sum of \$7,184.18 of taxes, together with the costs, interest and penalties thereon as authorized by law, be and the same is hereby dismissed for want of equity.

[fol. 108] (4) That the defendant pay the costs of this proceeding to be taxed by the clerk of this court.

And now again comes the complainant, by its said solicitors, and prays an appeal herein to the Supreme Court of Illinois, which appeal is allowed upon the complainant's filing a bond herein on or before the 1st day of August, A. D. 1924, in the penal sum of \$1000.00, conditioned according to law, with sureties to be approved by the clerk of this court.

And now at the time of entering the above and foregoing decree again comes the complainant, by its solicitors as aforesaid, and moves the court to continue in effect pending the appeal of this cause, the temporary writ of injunction heretofore entered herein on the 7th day of June, A. D. 1924, restraining and enjoining Patrick J. Carr, County Treasurer of Cook County in the State of

Illinois and ex officio County Collector of Cook County in the State of Illinois, his deputies, clerks, attorneys, agents and servants, from demanding, collecting or receiving of and from the complainant the sum of \$10,678.50, or any part thereof, extended against the complainant as taxes on its net receipts in the County of Cook and State of Illinois, and in the towns, municipalities and taxing districts therein, for the year A. D. 1923.

And the court having heard arguments of counsel and now being fully advised in the premises, doth find that good cause for allowing said motion appears of record herein, and that said motion should be allowed;

It is, therefore, ordered by the court that the temporary writ of injunction heretofore issued herein on the 7th day of June, A. D. 1924, restraining and enjoining Patrick J. Carr, County Treasurer of Cook County, in the State of Illinois, and ex officio County Collector of Cook County, in the State of Illinois, his deputies, clerks, attorneys, agents and servants, from demanding, collecting or receiving of and from the complainant the sum of \$10,678.50, or part [fols. 109-133] thereof, extended against the complainant as taxes on its net receipts in the County of Cook and State of Illinois, and in the towns, municipalities and taxing districts therein for the year A. D. 1923, be and the same is hereby continued, in full force and effect pending the appeal of this cause.

Enter.

Charles M. Foell, Judge.

O. K. as to form. Hiram T. Gilbert, Solicitor for Defendant.
Bates, Hicks & Folonic, Solrs. for Complainant.

[fol. 134] IN SUPREME COURT OF ILLINOIS, OCTOBER TERM, A. D.
1924

Number 16301, Agenda 112

HANOVER FIRE INSURANCE COMPANY, Appellant,

vs.

PATRICK J. CARR, County Treasurer of Cook County and ex Officio
County Collector of Cook County, Appellee

Appeal from Superior Court Cook County

OPINION—Filed April 24, 1925

STONE, J.:

Appellant, a private corporation organized under the laws of the State of New York for the purpose of carrying on the business of fire, marine and inland navigation insurance, filed its bill against the appellee as County Treasurer and Collector of Cook County,

praying for an injunction to restrain the collection of a certain tax hereinafter referred to. A temporary injunction was granted as prayed, and on final hearing, a stipulation of facts was entered into and the court entered a decree making the injunction permanent as to a certain amount of the tax not in dispute here, and dismissed the bill of complaint as to the remainder for want of equity.

The tax complained of was that assessed under Section 30 of the Fire and Marine Insurance Act of 1869 as amended. (Cahill's Revised Statute page 73 paragraph 169.) It is shown by the stipulation of facts that from May 1, 1922 to April 30, 1923, and for some years prior thereto, appellant conducted the business of fire insurance in the town of South Chicago, in Cook County, through agents [fol. 135]cies which it maintained there. It regularly procured the license issued by the Department of Trade and Commerce and has annually paid the tax of 2% on its gross premium receipts to the state under an act in relation to the taxation of non-resident corporations etc, approved June 28, 1919. (Laws of 1919 page 628.)

In 1923 the agents of the appellant in the town of South Chicago made no return of net receipts to the Board of Assessors of Cook County. That Board therefore entered as appellant's net receipts the sum of \$90,000.00, added thereto a penalty of \$45,000.00, and took one-half of this total amount of \$67,500.00 upon which to assess the tax required. The Board of Review fixed the net receipts of the appellant at the sum of \$90,824.00 and took the same at its full amount for assessment purposes. All personal property in Cook County except the net receipts of foreign fire insurance companies, was sealed and debased in value, one-half of the "full value" being taken for assessment purposes.

Appellant contends that Section 30 of the Fire, Marine and Inland Navigation Insurance Act is unconstitutional and void for the reason that it violates Section 1 of Article IX of the Constitution of Illinois by imposing a tax which is not imposed on domestic fire insurance companies or casualty companies; that such tax is not a privilege tax but is either a tax on property or a tax on business, and that as either, it violates the constitutional provision as to uniformity. It is also said this section is void in that it violates the equal protection and due process clauses of the 14th amendment to the constitution of the United States. The further contention is made that even though the statute be held valid, the tax on net receipts must be assessed as personal property and sealed and debased as such. [fol. 136] Said Section 30 is as follows:

"Every agent of any insurance company, incorporated by the authority of any other state or government, shall return to the proper officer of the county, town or municipality in which the agency is established, in the month of May, annually, the amount of the net receipts of such agency for the preceding year, which shall be entered on the tax lists of the county, town and municipality, and subject to the same rate of taxation, for all purposes—state, county, town and municipal—that other personal property is subject to at the place where located; said tax to be in lieu of all town and municipal

licenses; and all laws and parts of laws inconsistent herewith are hereby repealed: Provided, that the provisions of this section shall not be construed to prohibit cities having an organized fire department from levying a tax, or a license fee, not exceeding two per cent, in accordance with the provisions of their respective charters, on the gross receipts of such agency, to be applied exclusively to the support of the fire department of such city."

Section 1 of Article IX of the State Constitution, is as follows:

"The General Assembly shall provide such revenue as may be needful by levying a tax, by valuation so that every person and corporation shall pay a tax in proportion to the value of his, her or its property—such value to be ascertained by some person or persons, to be elected or appointed in such manner as the general assembly shall direct, and not otherwise; but the general assembly shall have power to tax peddlers, auctioneers, brokers, hawkers, merchants, commission merchants, showmen, jugglers, inn-keepers, grocery keepers, liquor dealers, toll bridges, ferries, insurance, telegraph and express interests or business, vendors of patents, and persons or corporations owning or using franchises and privileges, in such manner as it shall from time to time direct by general law, uniform [fol. 137] as to the class upon which it operates."

Some of the questions involved here were before this court in *People vs. Kent*, 300 Ill. 324, and *People v. Barrett*, 309 Ill. 53, and were there decided against appellant's contentions here. Appellant argues however, that what was said in the *Kent* case pertaining to the questions involved here, was not necessary to the decision of the case and was wrong and should not be adhered to, and that the *Barrett* case, having been based on the *Kent* case, is wrong and should be overruled. In that case as in the case at bar, extended briefs were filed by able counsel, some of whom appear here, and the points involved were fully argued. An examination of the briefs filed in the *Barrett* case shows that counsel for various foreign insurance companies, appearing either as representing parties or as amici curiae, there attacked this act on the ground that it is unconstitutional as violating Section 2, Article IV and Sections 9 and 10 of Article IX of the State Constitution and the 14th Amendment of the United States Constitution. It was there also contended that if the statute was valid, the net receipts must be taxed as personal property, to be sealed and debased as in other cases of personal property taxed. It was argued in the *Barrett* case as here, that contemporaneous construction on the part of the Executive Department of the state has continued for a sufficient length of time to be of controlling force.

People v. Kent, supra, was an action in mandamus against the respondent as agent for various foreign fire insurance companies, to require him to make return of net receipts to the Board of Review in accordance with Section 30 of the Fire, Marine and Inland [fol. 138] Navigation Insurance Act. In awarding the writ of mandamus it was held as a basis of that decision, and not as obiter dictum,

as it is argued, that the tax levied on the net receipts of such foreign insurance companies, was not a property tax but was assessed on the business of insurance done; that the regulations relating to personal property tax had no application to the tax there provided. It was also held that there existed in the legislature, power and authority to adopt the methods prescribed by which the amount of the tax is to be determined. In *People v. Barrett*, supra, it was again held that the tax on net receipts of foreign insurance companies, is not a personal property tax and not entitled to be scaled or reduced. It was also there held that section 30 is not unconstitutional as violating Section 10 of Article IX of the Illinois Constitution, requiring uniformity of taxation, and that since the tax was not a property tax but a tax on the business of insurance done, it does not violate Section 1 of Article IX of the constitution.

Appellant contends that if the *Barrett* case is right in holding that the tax in question in that case is a tax on insurance business done in the state, then such tax is a property tax and not an excise tax, and that since this is so, the Act which requires foreign fire insurance companies to pay this tax, while foreign casualty companies and domestic fire insurance companies are not required to pay the same, is void as against the uniformity clause of Section 1 of Article IX of the State Constitution and in violation of the Equal Protection clause of the 14th amendment to the constitution of the United States. It is said that this court having held that this is a tax on business, either a logical or legal possibility of its being considered a privilege tax is precluded; that a privilege tax was by the [fol. 139] act of 1919, hereinbefore referred to, levied as the consideration for the privilege of coming into the state to do business, while a tax on business is that levied after the insurance company has been allowed to do business in the state and is therefore levied on the property of a person within the state and whether it be considered a property tax or a business tax, it is, under either view, subject to the constitutional requirement of uniformity; and is not, in any view, a privilege tax such as is authorized by the latter clause of Section 1 of Article IX of our constitution empowering the Legislature to tax "insurance, telegraph and express interests or business."

The General Assembly has power to prescribe the terms and conditions upon which foreign corporations other than corporations engaged in interstate commerce and those constituting instrumentalities of the United States Government, shall be allowed to do business in this state. The Legislature has, if it desires to use it, power to prevent foreign corporations from entering or transacting any business within the borders of this state. *Alpena Cement Co. v. Jenkins & Reynolds Co.*, 244 Ill. 354; *Raymond v. Hartford Fire Ins. Co.* 196 id. 329; *Hartford Fire Ins. Co. v. City of Peoria*, 156 id. 420; *Walker v. City of Springfield*, 94 id. 364; *Western Union Telegraph Co. v. Lieb*, 76 id. 172; *Ducat v. City of Chicago*, 48 id. 172; *People v. Thurber*, 13 id. 554; *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1; *Paul v. Virginia*, 8 Wall. 168.

It is not contended that the Legislature of this State may not

levy such privilege tax as it chooses without regard to the constitutional provisions compelling uniformity and equal protection of the laws, but it is said that the tax here involved, having been held to be a tax on business, cannot be considered a privilege tax. This is a misconception of the term "tax on business". Having a right [fol. 140] to prohibit a foreign corporation from entering the state to do business, it follows that the Legislature may exact such compensation for that privilege as it sees fit, and levy the same in any manner or by any method it chooses. The tax provided by Section 30 does not purport to be a property tax. Net receipts of course are personal property. The right given to the Legislature to provide for the levying of taxes on property, requires that the property be valued by an assessor or some person provided by the law to fix the valuation thereof. The Revenue act, in compliance with this mandate, provides that the assessor fix the value of such personal property as of the first day of April. It will be noted that under section 30 complained of, the net receipts of foreign insurance companies such as appellant, are not to be valued by an assessor or other authority, nor is the assessment to be based on property having a situs in this state on April 1st. In fact, it is not required that the net receipts acquire or retain a situs in this state at any time. It is a tax on the amount of business done for the privilege of continuing such business and the net receipts of such business are used as the basis of determining that tax. Such net receipts and the method prescribed, constitute the thing and the means by which it is to be determined the amount which foreign fire, marine and inland navigation insurance companies shall pay to the state, and to the various municipalities included in the act, as compensation for the right to do business in the state and in such municipalities. Section 30 provides that this tax shall be "in lieu of all town and municipal licenses," except for the support of organized fire departments. No constitutional prohibition exists against such a tax as a condition to the right to do business. A tax on business as provided in this [fol. 141] act is not as argued to be distinguished from a privilege tax. Considered as either, it is a tax on the right to do business in the State and is subject to no constitutional limitations except that it be uniform as to the class upon which it operates 4 Walker v. Springfield, *supra*; People v. Thurbar, *supra*; Pembina Mining Co. vs. Pennsylvania, 125 U. S. 181; Scottish U. & M. Ins. Co. v. Herriott, 109 Ia. 606.

The fact that a tax is a privilege tax does not necessarily require that it be paid as a condition precedent to entering the state. Such a condition, being precedent, could of course be met but once. However, the greatest financial benefit to such a company flows from the continuation of the privilege to do business. Compensation for that privilege should be based on the benefits actually derived from the business done under such privilege, and such compensation must necessarily be assessed in some manner after the business is done and the benefits thereof received. Section 30 provides the method by which the amount of this compensation shall be determined and assessed.

Counsel for appellant argue that the fact that the act requires that these net receipts shall be entered on the same tax lists and be subject to the same rate of taxation for all purposes, as other personal property is entered and is subject, shows that it is a personal property tax; that its payment is not made a condition to the right to do business in the State, and that it therefore cannot be considered a privilege tax. This is a misconception of the provisions of the statute pertaining to this tax.

Section 22 of the Act relating to fire, marine and inland navigation insurance, aside from specifying certain requirements imposed [fol. 142] upon foreign insurance companies, seeking to do business in this state and specifying what shall be necessary to secure the right of entry, further provides: "Nor shall it be lawful for any agent or agents to act for any company or companies referred to in this section, directly or indirectly, in taking risks or transacting the business of fire and inland navigation insurance in this state without procuring annually from the Insurance Superintendent, a certificate of authority stating that such company has complied with all the requisitions of this act which apply to such companies and the name of the attorney appointed to act for the company."

The provisions of Section 30 requiring the return of net receipts of this tax, are a part of the "requisitions of this act." It is evident therefore, from the language in Section 22 quoted, that before the appellant may continue in business in this state, its agent shall procure annually from the Insurance Superintendent of the State or his successor in law, a certificate showing that it has complied with the requirements of Section 30 with reference to of this tax. Such certificate cannot be lawfully issued without such showing. This act provides no other means of collecting such tax and no reference is made for its collection.

That it was the intention of the Legislature that the payment of this tax be made a condition upon which the business of fire insurance may be continued in this state by a foreign insurance company, is further shown by an act entitled "An Act providing a penalty for a violation of Section 30 of an Act entitled 'An Act [fol. 143] to incorporate and govern fire, marine and inland navigation insurance companies doing business in the state of Illinois, approved and in force March 11, 1869, approved June 22, 1893. (Smith Hurd's Statute, 1923, page 1157). The first section of that act declares that any foreign insurance company coming under the provisions of the act of 1869, authorized to do insurance business in this state, which places risks or policies of indemnity upon property located in this state in any other manner except through its regularly authorized agents, shall be deemed to have violated Section 30 of the Fire, Marine, etc. Act herein referred to. By Section 2 of that Act any company so violating Section 30 shall have its authority to transact business in the state revoked by the Auditor of Public Accounts for a period of not less than ninety days, and when so revoked, it shall not be re-issued until such insurance company has shown "complete compliance with the laws of this state governing fire, marine and inland navigation insurance companies,"

and has shown that all taxes and penalties and expenses due thereunder have been paid. It seems clear therefore, that this tax is levied as compensation for the privilege of continuing their business in the state.

While the Act of 1919, entitled "An Act in relation to the taxation of non-resident corporations, companies and associations for the privilege of doing an insurance business in this state," approved June 28, 1919, (Laws of 1919 page 628) imposes an annual state tax equal to 2% on the gross amount of premiums received by any foreign insurance company during the preceding year, less certain specified deductions, for the privilege of doing business in this state, that fact does not show that the tax imposed on the business of fire [fol. 144] insurance by Section 30 is not likewise a tax for the privilege of doing business. The Act of 1919 requires that the tax there levied be paid to the state. Section 30 requires that the tax be apportioned among the state and the different municipalities of the situs of the agency. A valid reason is seen for this distribution of the tax. The foreign fire insurance company takes its net proceeds largely from the vicinity of its agencies and it is but just that it return to the municipality in which its agency is located, something in lieu of the taxes that would otherwise be realized from such net receipts as are taken away.

The power to tax insurance interests or business is expressly conferred by the second clause of Section 1 of Article IX of the constitution. That section also requires that the Act of the General Assembly creating such tax, shall operate uniformly as to the class to which it applies, and appellant argues that since domestic fire insurance companies make the same sort of contract, transact the same sort of business and are likewise doing business within the state, they belong to the same class as foreign fire insurance companies which have been permitted to come into the state, and that therefore a tax levied against the latter which the domestic fire insurance companies do not have to pay, is not uniform as required by the section of the constitution referred to.

Counsel are in error in supposing that for purposes of taxation under this section of the constitution, foreign and domestic insurance companies belong to the same class because they are doing the same kind of business within this state. There is no reason why insurance companies may not be divided into classes, the very point of distinction in which shall be the domicile of such companies, i. e. whether foreign or domestic. The levying of taxes upon foreign [fol. 145] fire insurance companies and not upon domestic companies of the same character as compensation for the right to do business is not therefore an infraction of this provision of the constitution. *Hughes v. City of Cairo*, 92 Ill. 339; *Ducat v. City of Chicago*, supra; *Walker v. City of Springfield*, supra; *People v. Thurber*, supra; *Insurance Co. v. Bradley* 83 S. C. 418.

In *Home Insurance Company v. Swigert*, 104 Ill. 653 it was held that not only can the Legislature classify insurance companies into domestic and foreign, but may likewise divide foreign insurance companies into classes for purposes of taxation; that such companies

cannot complain of a classification which is made the basis for admitting them into this state, even though such insurance companies are put in different classes, for the reason that the state may exclude them entirely and therefore in permitting them to enter, may impose whatever conditions it chooses. Nor is there in this any injustice. Foreign insurance companies have or may have in this state on April 1st, when assessments on personal property are made, practically no thing of value, while domestic fire insurance companies are assessed for all of their holdings, both real and personal, including their choses in action, little, if any, of which tax is paid by foreign insurance companies. If it were to be said that Section 30 violates the uniformity clause of the constitution for the reason that foreign fire insurance companies, when admitted to this state should not be required to pay any tax which domestic insurance companies do not pay, by the same token domestic insurance companies who pay on all of their property, could justly complain that the Revenue law as applied to them is invalid for the reason that it, in effect, does not apply to foreign insurance companies doing a like business in the State, because such companies by reason of the withdrawal of their net receipts are able to escape all, or practically all, [fol 146] property taxation. The contention of appellant that this tax is void for want of uniformity, cannot be sustained.

Nor is section 30 open to the objection that it violates the equal protection clause of the 14th Amendment to the Constitution of the United States.

The portion of the 14th Amendment referred to, provides:

"No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction, the equal protection of the laws."

While a foreign insurance company may be a citizen, it is not a citizen of the state entitled to the equal protection of the laws of that state as contemplated by the 14th amendment to the constitution of the United States until it has complied with the conditions which entitle it to come and remain within the State. The only limitation upon the power of the state to prevent a foreign corporation from doing business within its limits or to exact conditions for allowing a corporation to do business in the state, arises where the corporation is an instrumentality of the Federal government or where its business is strictly commerce, interstate or foreign. *Pembina Mining Co. v. Pa.* 125 U. S. 181; *Paul v. Virginia*, supra; *Pensacola Telegraph Co. v. Western Union Telegraph Co.* 96 U. S. 1; *Missouri v. Lewis*, 101 U. S. 22; *Horn Silver Mining Co. v. New York*, 143 U. S. 305; *Home Ins. Co. v. New York*, 134 U. S. 594.

We are of the opinion that there is no equity in this portion of the bill of appellant and the Superior Court did not err in dismissing the same. The decree of that court will therefore be affirmed.

Decree affirmed.

(Dissent attached.)

[Title omitted]

DISSENTING OPINION

THOMPSON and DUNN, JJ., dissenting:

The constitutional objections to section 30 of the act to incorporate and govern fire, marine and inland navigation insurance companies doing business in this State presented for decision in this case, have not been presented or decided in any of the cases involving the construction of said section heretofore considered by us. *People v. Barrett*, supra, was a mandamus proceeding brought by the city of Chicago, an agency of the State which spends public funds raised by taxation against the Board of Review of Cook County, a tax assessing agency of the State. No insurance company or other tax paying person was a party to that litigation and therefore the question here presented could not have been presented in the proceeding. The validity of an act can only be questioned by a party to a suit whose interests will be adversely affected by a judgment or decree. Nowhere in the opinion is the question of uniformity discussed and it is clear from reading the opinion that the question was not there considered by the court. In *People v. Kent*, supra, the action was a mandamus proceeding brought by the city of Chicago against the agent of nineteen foreign insurance companies, which were named. The constitutional questions presented in this case could have been presented in that case, but it is clear [fol. 148] that the only questions presented by the parties and decided by the court were whether the tax involved was a property tax or excise tax, and whether the agent could be compelled by mandamus to make the return required by section 30. The court held specifically that the tax involved was a tax on the business of insurance which is authorized by the second division of section 1 of article 9 of our State constitution. It was said in the discussion of the question that this section of the constitution requires such tax to be fixed by general law uniform as to the class on which it operates, but whether the tax authorized by section 30 is a uniform tax was not considered, discussed or decided. In *Walker v. City of Springfield*, supra, the sole question before the court was the validity of a city ordinance imposing a tax based on premiums received by foreign insurance companies. The court expressly held that the tax was one referred to in the proviso to section 30 and that the tax mentioned in the first part of the section, which is the tax involved in the case at bar, was a different tax authorized for a dissimilar purpose. The only constitutional questions raised by the parties and considered by the court in the *Walker* case were that the tax imposed by the ordinance was double taxation and that it was not uniform. The court held that the tax there under consideration was privilege tax or license fee and that it was not double taxation and that it was uniform on the class on which it operated. No

reference was made to the business tax mentioned in the part of section 30 here under consideration and such a tax not being involved in the proceeding, manifestly no ruling was made with respect to it. No case is cited in support of the opinion filed where the objection here presented for decision was considered or decided and we are of the opinion none can be found. It will appear from [fol. 149] the discussion which follows that we do not agree with the construction given to section 30 of the act of 1869 nor with the construction given to other acts relating to the business of insurance which bear indirectly on the question before the court.

Our constitution recognizes a distinction between a tax on the insurance business, which is an occupation tax, and a tax on the corporation using the privilege of doing an insurance business, generally called a franchise tax. In 1919, the legislature passed an act in relation to the taxation of non-resident insurance companies. This act provides "that each non-resident corporation, company and association licensed and admitted to do an insurance business in this State shall, except as herein otherwise provided, pay an annual State tax for the privilege of doing an insurance business in this State, equal to two per centum on the gross amount of premiums received during the preceding calendar year on contracts covering risks within this State. * * * The tax herein provided for shall be in lieu of all license fees or privilege or occupation taxes levied or assessed by any municipality in this State, and no municipality shall impose any license fee or privilege or occupation tax upon any such corporation, company or association, or any of its agents, for the privilege of doing an insurance business therein; but this act shall not be construed * * * to prevent the levy and collection of the tax authorized by section 30 of an act entitled, 'An act to incorporate and to govern fire, marine and inland navigation insurance companies doing business in the State of Illinois.'" (Smith's Stat. 1923, p. 1157.) Other sections of the act provide the method of computing the amount of the annual tax and of collecting it, and section 12 [fol. 150] makes the penalty for failing to comply with the provisions of the act a revocation of the license to do an insurance business in this State. The title and the body of the act indicate clearly that this is a franchise tax collected from foreign insurance companies as compensation to the State for the privilege granted by it to the company to do an insurance business in this State. The provisions of section 1 of the act clearly indicate that it is to be the only franchise tax collected by the State or any of its agencies; but the right of local taxing authorities, granted by other statutes, to collect from such companies an occupation tax and a tax on the real and personal property located within the several taxing districts, is specifically preserved.

No reference is made in the title of the act of 1869, of which section 30 is a part, to taxation, nor is there any provision in the act levying a tax or providing a penalty for the non-payment of a tax. The act is one "to incorporate and govern fire, marine and inland navigation insurance companies doing business in the State of Illinois." The first twenty-one sections of the act relate to the in-

corporation and government of domestic companies. Section 22 relates to the method by which foreign companies may be admitted to do business in the State and to the government of companies so admitted. Before there is granted to a foreign insurance company the right to do business in this State, section 22 requires (1) proof that a certain specified capital has been subscribed and paid, (2) the appointment of a resident attorney in fact, and the filing of a certificate of such appointment; (3) the filing of a certified copy of its charter and a verified statement showing details of its organization, assets and liabilities; (4) the deposit with the insurance department of securities, and (5) the securing of a certificate of authority for its agents; and its right to continue to do business here depends upon [fol. 151] the filing of an annual statement of its financial condition. Compliance with the provisions of section 30 is not made a prerequisite for admission to do an insurance business in this state nor to continue such a business. The section does not require any act on the part of the company at any time. It requires the agent of a foreign insurance company to return to the proper taxing authorities the amount of the net receipts of his agency. In order to prevent a circumvention of the legislative intent, there was passed in 1893 an act providing a penalty for violation of section 30. This act makes it unlawful for any insurance company to do an insurance business in this State except through legally authorized resident agents and penalizes any company writing insurance otherwise than through resident agents possessing proper certificates of authority by revoking its license to do business in this State. (Smith's Stat. 1923, p. 1157.) This statute acts directly upon the foreign insurance companies, and a compliance with the act of 1893 is an additional prerequisite to the right of such companies to do an insurance business in this state. Section 30 acts directly upon the agent of foreign insurance companies, and if such agent fails or refuses to make the return required by the section, he may be compelled by mandamus to make the return. (*People v. Kent*, supra.) Section 30 does not levy a tax on net receipts or on any other property of foreign insurance companies. It simply requires the agent to return to the proper taxing authorities the amount of the net receipts of his agency for the preceding year so that the taxing authorities may enter this amount on the tax list for the purpose of determining the amount of tax to which the particular insurance business shall be subjected in the particular taxing district. The [fol. 152] method of collecting the tax is not fixed by section 30 or any other section of the act of 1869.

That the tax on net receipts, to which the provisions of section 30 relate, is not a tax levied as compensation for the privilege of doing an insurance business in this State is no longer an open question. In *City of Chicago v. James*, 114 Ill. 479, and in *Walker v. City of Springfield*, 94 Ill. 364, it was held that the portion of section 30 preceding the proviso relates to a tax on the business of insurance as distinguished from a fee for a license to exercise the privilege of conducting an insurance business. In *People v. Kent*, supra, it was held that this tax is a charge made upon the business

of insurance for the purpose of compelling that business to bear its just proportion of the burdens of government. The amount of the net receipts of the business is used as a measure for determining the amount of the annual tax, and the tax is levied without regard to the value of the assets or physical property of the insurance company within the State and without regard to the number of policies issued or the value of the property insured. In *People v. Cosmopolitan Fire Insurance Co.*, 246 Ill. 442, we held that the tax on net receipts collectible under section 30 is not a fee for a license to do an insurance business in this State. Section 30 does not assume to exact a fee as a prerequisite to the granting of authority to do an insurance business in this State, but it assumes that the authority to do such a business exists independently of its provisions. There is a clear distinction between the privilege to transact a business within the limits of a State and the actual operation of the business itself. The one looks to preparation for engaging in the business, and the other is the actual engagement in it. (*Green v. Kentenia Corp.*, 175 Ky. 661, 194 S. W. 820.) It is just as clear that there [fol. 153] is a distinction between a tax on a particular business and a tax on the person exercising the privilege of engaging in that business. The payment of the latter is a condition precedent to the right to engage in the business, while the former is merely a charge on the business for the purpose of raising revenue for the maintenance of government. The right of a foreign corporation to do business in this State is a privilege and the tax levied against the corporation as compensation for the right to enter or remain in the State is what is commonly called a privilege or franchise tax. It may be imposed for the grant of a privilege which is never exercised by the licensee. On the other hand, a tax on the business of the corporation is a charge upon the result of exercising the privilege when exercised. This distinction between a business tax and a privilege tax was recognized and applied in *Nebraska Telephone Co. v. City of Lincoln*, 82 Neb. 59, 117 N. W. 284.

A State has the right to prohibit a foreign insurance company from exercising any part or all of its charter powers within its borders, to impose such terms and conditions upon its right to do business in the State as it may see fit, or to entirely exclude it from the State. (*Alpena Portland Cement Co. v. Jenkins & Reynolds Co.*, 244 Ill. 354; *Hartford Fire Insurance Co. v. City of Peoria*, 156 id. 420.) The privilege of doing an insurance business in this State accorded to a foreign corporation being distinct and different from the privilege accorded to a domestic corporation, the legislature, in fixing the tax on the privilege of doing business, has the power to place foreign corporations in one class and domestic corporations in another. (*Hughes v. City of Cairo*, 92 Ill. 339,) and also to subdivide foreign corporations into different classes. (*Home Insurance Co. v. Swigert*, 104 Ill. 653.) On the other hand in exercising its power to tax a business, the legislature is specifically required by section 1 of article 9 of our State constitution to tax "by general law, uniform as to the class upon which

it operates," and, under the fourteenth amendment to the Federal constitution the State cannot "deny to any person within its jurisdiction the equal protection of the laws." These provisions apply to a foreign corporation which has complied with all the conditions of admission prescribed by the State and which has been granted the privilege of engaging in business within the State. The law is settled that after a foreign corporation gets into the States its burdens shall be no more onerous than those of domestic corporations for exercising the same character of privileges. (8 Fletcher Cyc. of Corporations, sec. 5755; *Southern Railway Co. v. Greene*, 216 U. S. 400, 30 Sup. Ct. 287; *Security Savings and Loan Ass'n v. Elbert*, 153 Ind. 198, 54 N. E. 753). The question of making classifications for the purpose of enacting laws concerning matters within its jurisdiction is primarily for the legislative department and it can become a judicial question only when the action of the law-making body is clearly unreasonable, arbitrary and discriminatory. But such classifications must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. (*McGrath v. City of Chicago*, 309 Ill. 515; *F. S. Royster Guano Co. v. Commonwealth of Virginia*, 253 U. S. 412, 40 Sup. Ct. 560.) The power of taxation is an essential and inherent attribute of sovereignty belonging, as a matter of right, to every independent government. Therefore the legislature, subject to constitutional restrictions, may tax all property or only certain kinds of property, all occupations or only certain occupations, and all privileges or only certain privileges. Constitutional provisions relating to the power of taxation do not operate as grants of the power of taxation to the government, but instead merely constitute limitations upon a power which would otherwise be practically without limit. The limitations fixed by our State constitution are (1) that all taxes levied on property shall be by valuation, and (2) that all excise taxes levied (a) on business or (b) on persons using a privilege shall be by general law, uniform as to the class upon which it operates. The legislature may classify businesses for the purpose of taxation but when the classification is made all which by the existence of the facts on which the classification is made fall within it, must be subjected to the tax imposed. *Pullman Palace Car Co. v. State* 64 Texas 274, 53 Amer. Rep. 278; *Hoger v. Walker*, 128 Ky. 1, 107 S. W. 254; *Mutual Reserve Fund Life Assn. v. Augusta* 109 Ga. 73; 35 S. E. 71.

The Hanover Fire Insurance Company derives its receipts from premiums paid on policies issued on the following, among other, classes of insurance: (1) Fire, (2) lightning, (3) tornado, (4) navigation and transportation, (5) fire apparatus and damage by same, (6) crop and livestock, (7) explosion, and (8) automobile. Domestic insurance companies derive their receipts from identically the same classes of insurance business. Casualty companies, both domestic and foreign, write insurance covering four of the same classes, namely, fire apparatus, crop and livestock, explosion, and automobile. [fol. 156] Unincorporated entities permitted by the laws of this

state to do an insurance business under regulations prescribed by law are engaged in the same insurance business as the incorporated companies mentioned in section 30. In transacting the business of insurance, these four groups of persons or corporations are in direct competition with each other in this State, and under the authorities cited, all of them are entitled to the equal protection of the laws of this State. Every tax levied on the business of insurance, under the limitation fixed by the second division of section 1 of article 9 of our constitution, must be "by general law, uniform as to the class upon which it operates." An occupation tax on the business of insurance, to be valid, must operate alike upon all persons or corporations engaged in the same class of insurance business. Section 30, operating upon insurance companies incorporated by the authority of other States or governments and licensed to do business in this State, and not upon insurance companies incorporated under the laws of this State and other companies and persons doing identically the same class of insurance business, contravenes the Federal and State constitutions and is void.

[fol. 157]

IN SUPREME COURT OF ILLINOIS

[Title omitted]

DISSENTING OPINION

DUNCAN, C. J., dissenting:

Section 30 aforesaid is a valid enactment, as I view it, that does not contravene any provision of our State or Federal constitution when properly construed with subsequent acts of the Illinois legislature. At the time this statute was passed personal property was required by law to be listed and taxed at its cash value. Such property is now required by law to be listed at its cash value and is taxed at one-half its cash value. In my judgment the court has erred in its present and in some of its previous decisions in holding to the effect that subsequent acts of the legislature, requiring personal and other property to be listed at cash value and taxed at one-third or one-half the cash value thereof, had no application to the taxing of net receipts of foreign insurance companies under said section 30; and that the court also erred in holding that such net receipts of foreign insurance companies under said section 30 are not subject to being scaled and reduced in value under the Juul law in the same manner that other personal property is subject to under that law.

It will not aid us in the least in undertaking to define and classify the taxes that are collected under section 30 aforesaid. We know such taxes are not poll taxes, and it does not aid us if it is positively [fol. 158] demonstrated that such taxes are excise taxes. What we really need to understand, it seems to me, is the object and purpose of the act and the necessity therefor in order to tax such foreign insurance companies in substantially the same manner as are our local

and resident insurance companies of the same class. Our resident insurance companies of the class mentioned in said section had to pay an annual tax not only on all their personal and real property actually possessed and owned by them in this State, but they also had to pay the same character of taxes on their net annual gains or accumulations from the business transacted by them every year. We may very properly call it a tax on their annual gains or net profits. Such net gains or profits were taxed as money or other property depending upon whether or not the local insurance companies had invested their net receipts in other personal or real property or were held as cash or money. It was not possible for such a resident insurance company to escape such taxes unless they invested the net cash so received in property in some other State, if they complied with the law. The tax as to resident insurance companies was a tax on money or property here in the country. The foreign insurance companies of the same class accumulated their net profits or net gains as cash and they were avoiding practically all tax thereon in this State because of the provisions of our taxing laws that cash as well as all other personal property was to be listed and taxed on the amount and value thereof held and owned on the first day of April or first day of May of each year. Their cash, or practically all of it was sent out of the State before the day named in the statute for listing and valuing the same arrived, and the result was such corporations were [fol. 159] evading and escaping practically all taxation on their net profits or net gains they had accumulated by the business they had transacted in the State, which the legislature deemed unfair and unjust to the local insurance companies of the same class as well as to the people of the State. Hence section 30 was passed and every provision of it shows clearly that it was the intention of the legislature to tax both local and foreign insurance companies therein mentioned upon substantially the same character of property and equally and uniformly and without discrimination.

This tax as to the local insurance company was a personal property or other property tax because such net annual gains or profits had their situs here in the shape of money or other property if the money had been invested. As to the foreign insurance company of that class it was a tax on net receipts or net profits or net gains that might or might not have a situs here, because most of it had been sent out of the State in the form of cash or money. Nevertheless both companies were taxed and are taxed equally and uniformly and without discrimination, or as nearly so as is possible to be done, on the same property or its representative, the net annual gains or net accumulations or profits realized upon their annual business transacted in the State.

The statute shows clearly and unequivocally that the objects and purposes and results of taxation of insurance companies local and foreign have been and will continue to be as above stated if the statute itself is followed and the subsequent acts of the legislature afore-[fol. 160] said applied, and which by necessary implication should be applied by the taxing authorities. The act itself specifically provides that the amount of the net receipts of such agency for the pre-

ceding year shall be entered on the tax lists of the county, town and municipality, and subject to the same rate of taxation, for all purposes—state, county, town and municipal—that other personal property is subject to at that place where located. It cannot be subject to the same rate of taxation if such net receipts bear twice the amount of taxes as the local insurance companies net gains bear. The very language of the act forbids that such net receipts be assessed at full value while property now is taken at only half value for taxation. The statute was valid and violated no provision of the constitutions, State or Federal when enacted, and is still the same valid act intending to deal with equal and exact justice with both foreign and domestic insurance companies of the class aforesaid. It is only prevented from doing so by the interpretation now placed upon it by the court which I believe was not only never intended, but is expressly disavowed by the very language of the act. By necessary implication of the subsequent acts and by the language of section 30, such net receipts of foreign insurance companies aforesaid must be taxed at half value and scaled under the Juul law so that they will be assessed and "Subject to the same rate of taxation," "that other personal property is subject to at the place where located," as expressly provided in section 30 aforesaid.

[fols. 161-165] IN SUPREME COURT OF ILLINOIS

[Title omitted]

JUDGMENT—April 24, 1925

And, now on this day, this cause having been argued by counsel, and the Court having diligently examined and inspected as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the Decree aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error:

Therefore, it is considered by the Court that the Decree of the Superior Court of Cook County aforesaid, be affirmed in all things and stand in full force and effect, notwithstanding the said matter and things therein assigned for error. And it is further considered by the Court that the said Appellee recover of and from the said Appellant costs by him in this behalf expended, to be taxed, and that he have execution therefor.

[fol. 166]

IN SUPREME COURT OF ILLINOIS

[Title omitted]

ORDER OVERRULING PETITION FOR REHEARING—JUNE 18, 1925

Now on this day the Court having duly considered petition for rehearing filed herein by appellant and the Court being now advised in the premises doth overrule the prayer of the petition and denies a rehearing of this cause.

[fols. 167-173] IN SUPREME COURT OF ILLINOIS

CLERK'S CERTIFICATE

I, Charles W. Vail, Clerk of said Court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of [Title omitted], and also of portions of brief of plaintiff in error and portion of petition for rehearing, with the Opinion of the Court rendered therein, as the same now appear of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Supreme Court, at Springfield, in said State, this 29th day of June, A. D. 1925.

Chas. W. Vail, Clerk Supreme Court. (Seal of the Supreme Court, State of Illinois, August 26, 1818.)

[fol. 174]

[File endorsement omitted]

IN SUPREME COURT OF ILLINOIS

[Title omitted]

ASSIGNMENTS OF ERROR—Filed June 26, 1925

And now comes the Hanover Fire Insurance Company, a corporation, plaintiff in error in the above entitled cause, and avers and shows that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Illinois in the above entitled cause, the Supreme Court of the State of Illinois erred to the grievous injury and wrong of the plaintiff herein, and to the prejudice and against the rights of the plaintiff in error in the following particulars, to-wit:

(1) The Supreme Court of the State of Illinois erred in adjudicating and deciding that Section 30 of an act of the General Assembly of the State of Illinois entitled, "An Act to incorporate and to govern fire, marine and inland navigation insurance companies doing

business in the State of Illinois," approved and in force March 11, 1869, as amended by act approved May 31, 1879, in force July 1, 1879, was and is a good and valid enactment and was and is not repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States;

(2) The Supreme Court of the State of Illinois erred in denying the claim of plaintiff in error that said Section 30 was repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States which provides:

[fol. 175] "Nor shall any state * * * deny to any person within its jurisdiction, the equal protection of the laws."

in that plaintiff in error, being a corporation, organized under the insurance laws of the State of New York and transacting its business of insurance in the State of Illinois after having paid to said State of Illinois a privilege tax for such purpose, and secured the license, permission and authority of the State of Illinois so to transact said business of insurance, was subject to a tax on its business of insurance while domestic insurance corporations of the State of Illinois, casualty insurance companies organized under the laws of the State of Illinois and under the laws of foreign states and governments, and doing business in the State of Illinois, partnerships, Lloyds, individuals and other insurers doing identically the same kind of business of insurance as plaintiff in error, were and are not subject to a tax on the business of insurance conducted by such other insurers, respectively;

(3) The Supreme Court of the State of Illinois, by its final judgment in this cause enforced a statute of the State of Illinois which singled out for taxation the business of insurance when transacted by plaintiff in error, an insurance company organized under the laws of the State of New York and lawfully transacting its said business of insurance within the jurisdiction of the State of Illinois, and exempted from taxation the like business of insurance when transacted by all other insurers, and by reason of so doing, the Supreme Court of the State of Illinois denied to the plaintiff in error the equal protection of the laws, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States;

(4) The Supreme Court of the State of Illinois, by its final judgment in this cause, held and adjudicated that said Section 30 imposed a tax on the business of insurance conducted by plaintiff in error, a fire insurance company organized under the laws of the [fol. 176] State of New York, even though plaintiff in error had complied with all the applicable provisions of the laws of the State of Illinois pertaining to the transaction of its said business of insurance in said State of Illinois, including the payment of a privilege tax for the license, privilege and authority so to transact its said business of insurance in said State of Illinois, by reason whereof said Section 30 as so construed and applied by the Supreme Court of the

State of Illinois, applying only to the taxation of the business of insurance when such business is conducted by fire insurance companies organized under the laws of other states and governments, and not applying to the taxation of the business of insurance when such like business of insurance is conducted by other insurers, such as domestic fire insurance companies, domestic and foreign casualty insurance companies, partnerships, Lloyds and individuals, denied and denies to plaintiff in error the equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States;

(5) The Supreme Court of the State of Illinois, erred in denying the claim of plaintiff in error, that said Section 30, which imposed a tax on the business of insurance when such business of insurance was conducted by a fire insurance company organized under the laws of other states and governments and exempted from taxation the like business of insurance when conducted by all other insurers, such as domestic fire insurance companies, domestic and foreign casualty insurance companies, partnerships, Lloyds and individuals was discriminatory and not equal in its operation, and was repugnant to section 1 of the Fourteenth Amendment to the Constitution of the United States in that it denied to the plaintiff in error, being within the jurisdiction of the State of Illinois pursuant to the license, privilege and authority of said State of Illinois, the equal protection of the laws.

[fol. 177] (6) The Supreme Court of the State of Illinois, by its final judgment and decision, denied to the plaintiff in error the equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in this that the constitution and laws of the state of Illinois provide that personal property shall be returned by the owner thereof to the proper assessing officers for taxation; and the laws of the State of Illinois provide further, that the assessing officers shall find, ascertain and determine the fair cash value of personal property, and insert in the assessment books, under the head of "Full Value," the fair cash value of such personal property; and insert in another column in the assessment books, headed "Assessed Value," one-half of said "Full Value," against which the rate per cent of tax is extended; while said Supreme Court of the State of Illinois, in the final judgment in this cause, held, adjudicated and determined that said Section 30, which requires net receipts of foreign fire insurance companies to be subject to the same rate of taxation as other personal property, imposed a tax on the full amount of said net receipts and not against one-half the amount thereof, although the Board of Review of Cook County, Illinois, in the assessment of taxes upon personal property for said year of 1923, uniformly, intentionally, systematically and deliberately set down in said column headed "Full Value," only 60% of the true, actual full value of personal property; and assessed and set down in the column headed "Assessed Value," one-half of the full value so debased, as aforesaid.

[fol. 178] (7) The Supreme Court of the State of Illinois erred in its adjudication and determination under said Section 30 that in imposing the tax thereunder against the plaintiff in error upon the basis of 100% of net receipts and not upon the assessed value thereof, to-wit: 50% of said net receipts, as is done in case of personal property, that the action of taxing officials in so imposing tax under said section did not proceed in contravention of the guarantees of Section I of the Fourteenth Amendment to the Constitution of the United States.

(8) The Supreme Court of the State of Illinois erred, in that it denied to the plaintiff in error the equal protection of the laws and violated the guarantees of Section I of the Fourteenth Amendment to the Constitution of the United States, in adjudicating and determining that the provisions of Section 30 above mentioned, providing that net receipts should be taxed at the same rate of taxation as other personal property, should be applied by taxing officials to tax net receipts of plaintiff in error at a rate of taxation more than double that of other personal property by systematically and intentionally debasing all other personal property and not so debasing the net receipts of plaintiff in error.

(9) The Supreme Court of the State of Illinois erred, in that in construction of said Section 30 and application thereof by taxing officials it adjudicated and determined that a taxation of all other personal property, by application of the rate per cent of taxation to other property upon an assessed valuation of 50%, systematically and intentionally applied to all other personal property and exemption [fol. 179] of domestic fire insurance companies; casualty companies, domestic and foreign; Lloyds Underwriters, and individuals, both foreign and domestic; from any taxation upon net receipts of insurance identical with that written by plaintiff in error and application of rate per cent of taxation to the net receipts of plaintiff in error upon the basis of 100% thereof, without any debasement or fixing of assessed valuation thereon, is not an infringement of the constitutional guarantees inuring to the benefit of plaintiff in error; and erred in adjudicating and determining that such course is not a denial of the equal protection of the laws guaranteed to the plaintiff in error by the first section of the Fourteenth Amendment to the Constitution of the United States.

(10) The Supreme Court of the State of Illinois erred in denying to plaintiff in error the equal protection of the laws guaranteed by Section I of the Fourteenth Amendment to the Constitution of the United States, in that:

In its adjudication and determination as to application of Section 30, recited in the first assignment of error, and although construing the same subservient to provision of the Constitution of the State of Illinois, Article IX, Section I, providing that:

"The General Assembly shall have power to tax * * * insurance * * * in such manner as it shall, from time to time,

direct by general law, uniform as to the class upon which it operates."

the Supreme Court of the State of Illinois nevertheless did adjudicate and determine that taxation of insurance was uniform as to the class of insurance upon which it operated, by application of classification whereby identical insurance when written by a domestic insurance company is exempted from taxation under such statute, such identical insurance when written by casualty companies, whether domestic to the State of Illinois or foreign to said State, and identical insurance when written by Lloyds Underwriters and by individuals, whether domestic to said State or foreign thereto, are exempted from such tax; and erred in so adjudicating and determining that arbitrary classification might be made of insurance when written by foreign fire insurance companies, and that it be subjected to such tax and the identical insurance when written by such other insurers as mentioned be exempted from such tax; and erred in adjudicating and holding that such classification was a just and lawful classification creative of uniformity of tax upon the business of insurance; and erred in adjudicating and determining that such classification did not deny to the plaintiff the equal protection of the laws guaranteed by Section I of Amendment XIV of the Constitution of the United States.

(11) The Supreme Court of the State of Illinois in its final judgment in this cause denied to plaintiff in error the equal protection of the laws, in violation of Section I of the XIV Amendment to the Constitution of the United States, in approving and confirming the action of the Board of Review of Cook County in assessing plaintiff in error on the full amount of its net receipts, whereas under the constitution and laws of the State of Illinois personal property is assessed upon one-half the value thereof, while said Section 30 requires that net receipts shall be subject to the same rate of taxation as other personal property.

[fol. 181] (12) The Supreme Court of the State of Illinois erred in affirming the judgment of the Superior Court of Cook County, dismissing the bill of complaint of plaintiff in error; and erred in not reversing the same and granting the relief therein prayed, because the admitted allegations of said bill of complaint disclose that the tax sought to be enjoined herein is levied, assessed and extended against the plaintiff in error upon an arbitrary, unlawful and unconstitutional basis and classification,—namely, is a tax upon the business of insurance not imposed equally upon said business by whomsoever transacted and not at the same rate of taxation as is imposed upon other personal property in said State of Illinois, and by such action, ruling and adjudication of the Supreme Court of the State of Illinois the same proceeds in violation of Section I of Amendment XIV to the Constitution of the United States, and denies to the plaintiff in error the equal protection of the laws guaranteed by said section.

(13) The Supreme Court of the State of Illinois erred in affirming the judgment of the Superior Court of Cook County; and erred in the affirmance of the action of said court in dismissing the bill of complaint of plaintiff in error; and in not granting and directing the relief in said bill of complaint prayed for, which said actions, rulings and adjudication of the Supreme Court of the State of Illinois are in contravention of Section I of Amendment XIV to the Constitution of the United States, and denies to the plaintiff in error the equal protection of the laws thereby guaranteed to it.

[fols. 182-192] Wherefore, for these and other manifest errors appearing in the record, the said Hanover Fire Insurance Company, a corporation, plaintiff in error, prays that the judgment of the said Supreme Court of the State of Illinois be reversed, annulled and set aside and held for naught, and that full justice be done it in the premises, etc.

Robert J. Folonie, Frederick D. Silben, Charles S. Deneen,
Charles E. Woodward, of Counsel.

[fol. 193]

[File endorsement omitted]

IN SUPREME COURT OF ILLINOIS

WRIT OF ERROR—Filed June 26, 1925

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Justices of the Supreme Court of the State of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Illinois before you or some of you, at the June Term, A. D. 1925 thereof, being the highest court of law or equity of the said state in which a decision could be had in the said suit between Hanover Fire Insurance Company, a corporation, appellant, and Patrick J. Carr, County Treasurer of the County of Cook in the State of Illinois, and ex officio County Collector of Cook County in the State of Illinois, appellee, wherein was drawn in question the validity of a statute of the State of Illinois, and the validity of an authority exercised under said state on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of such, their validity; a manifest error has happened to the great damage of the said Hanover Fire Insurance Company, a corporation, as by its complaint appears.

We being willing that error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and

proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty (30) days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable William Howard Taft, Chief Justice of [fols. 194-204] the Supreme Court of the United States, the 26th day of June in the year of our Lord One Thousand Nine Hundred Twenty-five.

Done in the City of Springfield in the County of Sangamon and State of Illinois with the seal of the District Court of the United States for the Southern Division of the Southern District of Illinois.

S. T. Burnett, Clerk of the District Court of the United States for the Southern Division of the Southern District of Illinois. (Seal of the District Court United States, Southern District Illinois.)

Allowed by Frank K. Dunn, Chief Justice of the Supreme Court of the State of Illinois.

A copy of the above and foregoing writ of error is deposited and lodged with the Clerk of the Supreme Court of the State of Illinois for the benefit of the defendant in error, Patrick J. Carr, County Treasurer of the County of Cook in the State of Illinois, and ex officio County Collector of Cook County in the State of Illinois.

Hanover Fire Insurance Company, a Corporation, by Robert J. Folonie, Frederick D. Silben, Charles S. Peneen, Charles E. Woodward, Attorneys for said Plaintiff in Error.

[fol. 205]

IN SUPREME COURT OF ILLINOIS

RETURN TO WRIT OF ERROR

In obedience to the commands of the within writ I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the within entitled cause, with all things concerning the same, together with portions of appellant's brief and portion of petition for rehearing, as requested an Praecipe incorporated herein.

In Witness Whereof, I hereunto subscribe my name and affix the seal of the said Supreme Court of Illinois, in the City of Springfield, this 29th day of June, A. D. 1925.

Chas. W. Vail, Clerk of the Supreme Court. (Seal of the Supreme Court, State of Illinois, Aug. 28, 1818.)

[fol. 206] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION BY
PLAINTIFF IN ERROR OF PARTS OF RECORD TO BE PRINTED, WITH
PROOF OF SERVICE—Filed Aug. 1, 1925

In compliance with Section 9 of Rule 11 of this court, plaintiff in error in the above entitled cause hereby states that it intends to rely upon the following points:

I

Section 30 of the act of the General Assembly of the State of Illinois entitled,

"An Act to incorporate and to govern fire, marine and inland navigation insurance companies doing business in the State of Illinois,"

approved and in force March 11, 1869 as amended by act approved May 31, 1879, in force July 1, 1879, is unconstitutional and void in that said act denies to plaintiff in error the equal protection of the laws, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

II

Section 30 of said act, as construed and applied by the Supreme Court of the State of Illinois, imposes a discriminatory tax upon [fol. 207] the business of insurance, unequal and unjust, predicated alone upon the character of the insurer, denies to plaintiff in error the equal protection of the laws and is contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Parts of Record to be Printed

The following parts of the record the plaintiff in error thinks necessary for the consideration of said points:

(1) Bill of complaint filed in the Superior Court of Cook County, Illinois, together with Exhibits attached thereto, commencing on page 5 of the transcript of the record filed herein and to and including page 51.

(2) The answer of the defendant in error filed in the Superior Court of Cook County, Illinois, commencing on page 61 of the transcript of the record filed herein and to and including page 70.

(3) The final decree of the Superior Court of Cook County Illinois, commencing on page 74 of the transcript of the record filed herein and to and including page 109.

(4) The opinions of the Supreme Court of the State of Illinois, including the dissenting opinion of Justices Thompson and Dunn

and the separate dissenting opinion of Chief Justice Duncan, commencing on page 133 of the transcript of the record filed herein and to and including page 160.

(5) Assignment of error by plaintiff in error commencing on page 174 of the transcript of the record filed herein and to and including page 182.

Charles E. Hughes, 100 Broadway, New York, N. Y.; Charles S. Deneen, 29 So. La Salle Street, Chicago, Ill.; Frederick [fols. 208 & 209] D. Silben, 137 So. La Salle Street, Chicago, Ill.; Robert J. Folonie, 39 So. La Salle Street, Chicago, Ill., Attorneys for Plaintiff in Error.

A copy of the above and foregoing is acknowledged this 28 day of July, A. D. 1925. The parts of the record above designated are sufficient to present the case fully and we accordingly consent to a hearing on the parts as designated and to the immediate printing of the record.

Robert E. Crowe, Criminal Court Building, Chicago, Illinois;
Francis X. Busch, City Hall, Chicago, Illinois; Leon Hornstein, City Hall, Chicago, Illinois; Hiram T. Gilbert, 928 Otis Building, 10 South La Salle Street, Chicago, Ill.; Claire E. More, 515 Home Insurance Bldg., Chicago, Illinois, Attorneys for Defendant in Error.

Endorsed on cover: File No. 31,349. Illinois Supreme Court, Term No. 626. Hanover Fire Insurance Company, plaintiff in error, vs. Patrick J. Carr, county treasurer of the county of Cook, State of Illinois, &c. Filed July 24th, 1925. File No. 31,349.

FILED
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No. ~~625~~ 6 ~~179~~

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1925.

HANOVER FIRE INSURANCE COMPANY,

Plaintiff in Error.

vs.

PATRICK J. CARR, County Treasurer and ex
officio county collector of Cook County, Illi-
nois,

Defendant in Error.

Error to Supreme
Court of Illinois

BRIEF OF PLAINTIFF IN ERROR IN OPPOSITION
TO MOTION OF DEFENDANT IN ERROR
TO AFFIRM.

CHARLES E. HUGHES,
CHARLES S. DENEEN,
ROBERT J. FOLONIE,
FREDERICK D. SILBER,

ATTORNEYS FOR PLAINTIFF IN ERROR.



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**IN THE
SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, A. D. 1925.

HANOVER FIRE INSURANCE COMPANY,
Plaintiff in Error,

vs.

**PATRICK J. CARR, County Treasurer and
ex officio county collector of Cook
County, Illinois,**
Defendant in Error.

} Error to Supreme
Court of Illinois

**BRIEF OF PLAINTIFF IN ERROR IN OPPOSITION
TO MOTION OF DEFENDANT IN ERROR
TO AFFIRM.**

—

STATEMENT OF THE CASE.

The facts in this case are admitted and incorporated as a finding of facts in the decree of the Court. The facts herein recited are undisputed in the record.

Plaintiff in error is a private corporation, organized under the laws of the State of New York for the purpose of carrying on the business of fire, marine and inland navigation insurance, with authority to write insurance against various hazards, including fire, lightning, hail, tempest, earthquake, explosion, water breakage, leakage, marine and navigation risks, tornado insurance and to make insurance upon motor vehicles against the hazards of theft and collision. During the year ending April 30, 1923, it conducted its business of insurance in the

town of South Chicago, Cook County, Illinois, writing the various lines of insurance recited. Its conduct of such business was pursuant to a license or certificate of authority issued to it by proper officials of Illinois, license being issued in compliance with statutory conditions, viz: the precedent

- (a) Appointment of agent for service of process. (Brief of Defendant in Error, 28.)
- (b) Filing copies of charter, etc. (Brief of Defendant in Error, 29.)
- (c) Making deposits of securities. (Brief of Defendant in Error, 30.)
- (d) Compliance with provisions of privilege law of Illinois. (Brief of Defendant in Error, 39.)

The net receipts of the agencies of plaintiff in error for the year ending April 30, 1923, in the town of South Chicago, amounted to \$90,823.95. The assessing officers of Cook County, acting under purported authority of Section 30 of the Insurance Laws of Illinois, assessed and extended a tax at the going tax rates, against the plaintiff in error upon an assessed value of \$135,000. Plaintiff in error filed a bill in equity to restrain the county collector from collecting the tax, alleging among other grounds of complaint that the law was in violation of the provisions of the XIV Amendment of the Constitution of the United States, and therefore void. Upon a hearing, the Court entered a decree restraining the collection of the tax so extended against so much of the assessment as exceeded \$90,824 and dismissed the bill as to the remainder.

The decree of the Superior Court of Cook County was affirmed by the Supreme Court of Illinois by a divided court, three of the seven Judges of the Court dissenting

from the decree of the affirmance. Of the dissenting Judges, two joined in a dissenting opinion upon the ground that the decree should be reversed because Section 30 violates the 14th Amendment of the Constitution of the United States (*Hanover Fire Insurance Co. v. Carr*, 317 Ill. 366).

The allegations of the bill of complaint, which were argued in the trial court and in the Supreme Court of Illinois, asserted the invalidity of Section 30 as being in contravention of the equal protection clause of the 14th Amendment of the Constitution of the United States. The assertion rests upon the following facts.

The net receipts of plaintiff in error which were taxed were derived from premium receipts upon the following kinds and character of insurance contracts issued by plaintiff in error:

1. Sprinkler leakage insurance;
2. Crop and live stock insurance;
3. Explosion insurance;
4. Automobile insurance, including fire, explosion, transportation, theft and collision;
5. Fire insurance;
6. Rent insurance;
7. Use and occupancy insurance;
8. Inland and ocean navigation and transportation insurance.

Fire insurance companies, domestic to the State of Illinois, during such period transacted the same business as that above recited, and insured against the same hazards and risks, and are excepted from tax under the terms of Section 30.

Casualty companies, whether domestic to the State of Illinois or foreign thereto, also during such period, pursuant to permission of the State of Illinois and concurrently with foreign fire insurance companies, wrote insurance against many of the identical hazards and risks (the first four classes above recited) insured by plaintiff in error.

The insurance as so written by casualty companies, domestic and foreign, upon classes concurrently written with foreign fire insurance companies, yield large returns to casualty insurance companies.

Noncorporate entities, such as individuals, partnerships, associations of individuals and Lloyds insurers also write all of the classes of insurance, the premium receipts of which were taxed against the plaintiff in error.

The tax imposed by Section 30 is imposed only upon the net receipts of insurance companies foreign to the State of Illinois, which are incorporated as fire, marine and inland navigation insurance companies, and is imposed neither upon the net premium receipts of domestic fire insurance companies doing an identical business, nor upon the insurance made by individuals or aggregations of individuals doing an identical business nor upon the net receipts of casualty companies upon insurances written concurrently with those of plaintiff in error.

The statute in question has been in force in the State of Illinois since the year 1869, and during all such period the tax on net receipts has been levied by tax assessment officers, reviewed by the Board of Review, the ordinary tax reviewing body, and until imposition of the tax complained of herein, the amount of the net receipts had been equalized and an assessed value placed on them, as

was done respecting other personal property. The courts of Illinois in repeated cases had held such to be the proper meaning, intent and application of the Act; that it was not a license tax or condition upon the doing of business but a tax for revenue upon net premium receipts as a tax upon property income.

By statute of the State of Illinois, after the full fair value of property is found by assessing bodies (which is found at sixty per cent more or less of the cash value), an assessed value is placed thereon of fifty per cent of such equalized amount called the "full, fair value." This percentage in former years was a smaller proportion. During the year in which the tax in question was imposed, an assessed valuation of fifty per cent of the full value was placed upon all other personal property and the net premiums of complainant assessed at their full value of 100 per cent.

The opinion of the Supreme Court of Illinois in the case at bar undertook to overturn the settled practice theretofore existing.

The effect of its decision, by eliminating both equalization and assessed values, is to impose a tax of three to four times that imposed upon other property of like amount in value.

The allegations of fact in the bill of complaint are admitted in the record and disclose a case of clear denial of the constitutional rights guaranteed by the 14th Amendment to the Constitution of the United States.

POINTS AND AUTHORITIES.

The questions presented by this record are real and substantial and the writ is not prosecuted for delay.

(1) While this Court is bound by the decision of the Supreme Court of Illinois as to the extent and scope of operation of the statute, yet this Court will say whether, in view of its operation as thus delimited, it infringes the Federal Constitution.

Clement National Bank v. Vermont, 231 U. S. 120.

St. L. W. R. Co. v. Arkansas, 235 U. S. 350.

Choctaw, O. & G. R. Co. v. Harrison, 235 U. S. 292.

St Louis Cotton Compress Co. v. Arkansas, 260 U. S. 346.

Truax v. Corrigan, 257 U. S. 312.

(2) So far as pertinent to this record, the Supreme Court of Illinois has defined the operation of the statute as follows:

(a) The statute applies to the taxation of the net receipts of insurance received by foreign fire insurance companies and not to the taxation of net receipts from like kinds of insurance written by other insurers.

(b) Although personal property in Illinois is taxed at only one-half its fair cash value, net receipts of foreign fire insurance companies must be taxed at the full amount thereof.

People v. Barrett, 309 Ill. 54.

Hanover Fire Ins. Co. v. Carr, 317 Ill. 366.

(3) This Court is never bound by characterizations in opinions of state courts, when this Court is discharging its most important function of protecting constitutional rights.

This Court, ascertaining from the decisions of the state Court what is the operation of the Act, will determine for itself what is the nature and legal effect of the statute.

St. Louis Cotton Compress Co. v. Arkansas, 260 U. S. 346.

Choctaw, O. & G. R. Co. v. Harrison, 235 U. S. 292.

Galveston H. & S. A. R. Co. v. Texas, 210 U. S. 217.

Northwestern Mutual Life Ins. Co. v. Wisconsin, 247 U. S. 132, 137.

U. S. Express Co. v. Minnesota, 223 U. S. 335, 346.

St. Louis S. W. R. Co. v. Arkansas, 235 U. S. 350.

Truax v. Corrigan, 257 U. S. 312.

In the case of *Choctaw, O. & G. R. Co. v. Harrison*, 235 U. S. 292, although the state Court held that the tax imposed by the statute there under consideration was one upon personalty, this Court say:

“Neither state courts, nor legislatures, by giving a tax a particular name, or by the use of some form of words, can take away our duty to consider its real meaning and effect.

We must regard the substance, rather than the form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the state.” *St. Louis S. W. R. Co. v. Arkansas*, 235 U. S. 350.

In the case of *St. Louis Cotton Compress Co. v. Arkansas*, 260 U. S. 346, although the state Court characterized the tax as one on occupation, this Court say that this Court

“is not bound by the characterization of it, so far as that characterization may bear upon the question of its constitutional effect. * * * The short question is whether this so-called tax is valid because of the name given it by the statute.”

In the case of *Clement National Bank v. Vermont*, 231 U. S. 120, the state Court defined the operation of the statute. This Court say:

“and it is for this court to say whether, in view of its operation, as thus delimited, it conflicts with the federal law.”

In a later case, this Court say:

“While these views of the nature and effect of the law are not conclusive upon us * * *.” *Northwestern Mutual Life Ins. Co. v. Wisconsin*, 247 U. S. 132, 137.

In another case, this Court say:

“While the determination that the tax is a property tax measured by gross receipts is not binding upon this court * * *.” *United States Express Co. v. Minnesota*, 223 U. S. 335, 346.

Such has been the uniform ruling of this Court as to the contract clause and the commerce clause and no reason is perceived why it should not apply when a state is dealing with foreign corporations admitted to the state and entitled to protection against unconstitutional discrimination.

(4) The fact that the Supreme Court of Illinois characterizes the tax as a “privilege tax” does not preclude this Court from determining the legal effect of the tax

as bearing on the validity or invalidity of the law. This Court may determine its own conclusions as to the legal effect of the statute, and is not bound by the name given the statute by the Supreme Court of the state.

Authorities cited, *supra*, under (3).

(5) The tax imposed by Section 30 is a tax for revenue and not a privilege tax for the following reasons:

(a) Section 30 plainly declares it to be a tax on property.

(b) Section 30 prescribes that it be imposed "at the same rate of taxation * * * that other *personal property* is subject to at the place where located."

(c) The payment of the tax imposed by Section 30 is not made a condition of the grant, or of a renewal of the certificate of authority of plaintiff in error to transact business in this state.

A tax of this character, imposed for revenue, and not made a condition of the right to do business, is a property tax and not a privilege tax.

People v. Cosmopolitan Fire Ins. Co., 246 Ill. 442.

New York Life Ins. Co. v. Bradley, 83 S. C. 418, 65 S. E. 433.

Parker v. North British & Mercantile Ins. Co., 42 La. Ann. 428, 7 So. 599.

(d) The tax has been admittedly construed as a property tax for fifty-four years. The returns were made to the assessing officers, the value of net receipts for taxation purposes was found, debased, equalized and assessed by the assessing officers, the rate per cent of tax levy was extended against the valuation so found, and the amount produced by the

extension was collected by the regular collecting officers as was done respecting other personal property.

(e) Each year since its admission to do business in Illinois, plaintiff in error has made its annual financial reports, has paid all license fees prescribed by Section 27 (Appendix 34), of the Act of which Section 30 is a part, and has secured a renewal of its certificate of authority.

Other provisions of the statute independent of the impositions of Section 30 are clearly made conditions of doing business. These provisions are omitted from the brief of defendant in error, and we attach them hereto.

For example: Section 22½ provides for revocation of license in case the annual statement of the financial condition of any company is falsely stated. (Appendix 33.)

When the company is financially unsound, its license may be revoked. Section 23. (Appendix 34.)

The tax here in question is not provided as a license fee. The statute makes provision for license fees in Section 27. (Appendix 34.)

The foregoing are in addition to the provisions of the privilege act proper, and in addition to the provisions of Section 22 set forth in the brief of defendant in error, page 28.

It is to be noted that licenses are issued upon conditions, and revoked for violations recited with particularity and specifically; but there is no provision of any kind for denying a license or revoking a license of authority to an insurance company for failure to pay taxes imposed by Section 30.

(f) In 1919 Illinois passed an act imposing an annual tax of two per cent on the gross receipts of foreign fire insurance companies—and of other insurance companies—which the law denominates

“An annual state tax for the privilege of doing an insurance business in Illinois.” (Brief of Defendant in Error 39-41.)

It will not be presumed that the legislature intended the same business to be taxed twice for the exercise of the same privilege, and it has not done so.

(6) This Court, adopting the operation of the law as declared by the Supreme Court of Illinois, must for itself determine whether the law in all its terms and as so applied is in its nature a tax upon property, either directly or upon its income, or whether its characteristics are those incident to a privilege tax.

Authorities cited, *supra*, under (3).

(7) The assessment now before the Court is the first assessment of net receipts at a valuation of twice that placed upon other personal property. During all the years from 1869 to 1923 all administrative taxing authorities, with the approval of the state Courts, taxed net receipts and personal property on the same basis and by the same rule. From 1869 to 1899 both personal property and net receipts were each taxed at full value. From 1899 to 1923 both personal property and net receipts were taxed on a given per cent of their full value, the law in 1923 requiring personal property to be assessed at one-half its fair cash value.

In 1923 personal property was taxed at one-half its fair cash value—as required by law—while net receipts were taxed at the full amount thereof, thereby casting twice the amount of tax on net receipts as was assessed on personal property.

(8) The decision by the state Court in the case at bar was made by a divided Court. Of the seven Judges of the state Court, three dissented. Two of the dissenting Judges, Justices Dunn and Thompson, dissent on the sole ground that Section 30 denies plaintiff in error the equal protection of the law and in the dissenting opinion, among other things, say:

“Compliance with the provisions of Section 30 is not made a prerequisite for admission to do an insurance business in this state nor to continue such a business. * * * That the tax on net receipts, to which the provisions of Section 30 relate, is not a tax imposed for the privilege of doing an insurance business in this state is no longer an open question. * * * Section 30 * * * contravenes the Federal and State constitutions and is void.”

(9) Having complied with all the conditions prescribed by the state, having paid its privilege tax and having received a license to transact business in Illinois, plaintiff in error was within the jurisdiction of the state and was entitled to all the protections which the laws of Illinois accorded to any person, or to any other corporation, in like circumstances.

Northwestern National Life Ass'n v. Riggs, 203 U. S. 243.

Blake v. McClung, 172 U. S. 239.

American Smelting and Refining Co. v. Colorado, 204 U. S. 103.

Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283.

(10) One of the constitutional protections inuring to plaintiff in error is, that the state cannot tax a foreign corporation which has properly qualified with the state in a mode different in principle from that in which it taxes its domestic corporations. All persons and corporations similarly circumstanced must be treated alike.

Royster Guano Co. v. Virginia, 253 U. S. 412.

Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283.

Southern Railway Co. v. Greene, 216 U. S. 400.

Atchison, T. & S. Ry. Co. v. Matthews, 174 U. S. 96.

Southwestern Oil Co. v. Texas, 217 U. S. 114.

Home Ins. Co. v. New York, 134 U. S. 594.

Waterman on Corporations, p. 283.

Greene v. Kentenia Corporation, 175 Ky. 661, 194 S. W. 820.

Erie Ry. Co. v. State, 31 N. J. L. 542.

Mutual Fund Life Ass'n v. Augusta, 109 Ga. 79, 35 S. E. 71.

Wright v. Southern Bell Telephone Co., 127 Ga. 227, 56 S. E. 116.

Hager v. Walker, 128 Ky. 1, 107 S. W. 254.

Truax v. Corrigan, 257 U. S. 312.

State v. Parr, 109 Minn. 147.

ARGUMENT.

I.

The opinion of the Supreme Court of Illinois, styling the tax a privilege tax, has no binding effect on this Court in passing upon its constitutionality.

The defendant in error bases its motion for affirmance of the case upon the ground that "the decision of the Supreme Court of Illinois that the tax in question is a privilege tax" etc., is binding upon this court "and is not now subject to review." Plaintiff in error asserts that the tax is not a privilege tax, that it is not a condition for doing business in Illinois, that it is a tax upon property and not upon privileges, and that therefore the cases cited by the defendant in error are not in point.

The statement of the Supreme Court of Illinois to the effect that the tax is "a tax upon privilege" is not a construction of the statute but a characterization of the nature and effect of the law which does not bind this court in determining its constitutionality. This court has repeatedly so held.

This court is never bound by characterizations in opinions of state courts, when this court is discharging its most important function of protecting constitutional rights.

Thus, under the Contract Clause, this court will determine for itself whether there is a contract and whether it has been impaired. Statements to the contrary by the state court will not control it. This court will take the operation of the statute as defined by the state court and

then determine the nature and effect of this operation from the constitutional standpoint.

So, when the question is whether interstate commerce has been directly burdened by a state enactment, this court will not be controlled by the characterizations of the state court.

The same is true when the state is dealing with a foreign corporation admitted to the state and entitled to protection against unconstitutional discrimination. This court will not be controlled by names given to the action of the state by the state court, but ascertaining from the decision of that court what is the operation of the Act, this court will determine for itself what is the nature and legal effect of the statute.

In the case of *Northwestern Life Insurance Company v. Wisconsin*, 247 U. S. 132-137, this court, in reviewing what the state court had said as to the nature and effect of the law as bearing upon its constitutionality, used the language: "While these views of the nature and effect of the law are not conclusive upon us * * *" etc.

In *U. S. Express Co. v. Minnesota*, 223 U. S. 335-346, this court says: "While the determination that the tax is a property tax is not binding on this court," etc.

What the Supreme Court of Illinois has said as to the meaning of the words of the statute with respect to its operation is binding upon this court. The Supreme Court of Illinois has construed the law:

(a) To apply to insurance companies foreign to the state of Illinois chartered as fire, marine and inland navigation insurance companies;

(b) Not to apply to premium or receipts upon identical insurances written by domestic fire insurance companies, by casualty companies, foreign or domestic, and by individuals or Lloyds associations, foreign or resident;

(c) To require an imposition upon premium receipts of more than double the tax imposed upon other personal property in the state of Illinois.

The Supreme Court of Illinois having so construed the law, this court accepting that construction as to the operation of the Act, must for itself determine whether the law in all its terms and *as so construed* is *in its nature* a tax upon property (either directly or upon income of property), or whether its characteristics are those incident to a privilege tax. In these conclusions, this court may take into account the fact that the tax is levied by assessors and reviewed by tax reviewing bodies, that it is a tax for revenue and not for license, and that its payment is not made a condition for doing business in the state.

In a leading case coming to this court from the Supreme Court of Arkansas, wherein this court declined to follow the characterization of the tax as made by the state court, this court said:

"The Supreme Court justified the imposition as an occupation tax—that is, as we understand it, a tax upon the occupation of the defendant. But this court, although bound by the construction that the Supreme Court may put upon the statute, is not bound by the characterization of it, so far as that characterization may bear upon the question of its constitutional effect. *St. Louis, S. W. R. Co. v. Arkansas*, 235 U. S. 350. The short question is, whether this so-called tax is saved because of the name given to it by the statute when it has been decided in *Allgeyer v. Louisiana*, 165 U. S. 578, that the imposition of a round sum, called a fine, for doing the same thing, called an offense, is invalid under the 14th Amendment."

In the same case, the court said:

“The name given by the state to the imposition is not conclusive.”

St. Louis Cotton Compress Co. v. Arkansas, 260 U. S. 346.

If the name given to the imposition by a statute is not conclusive, then the name given it by the courts of a state are not conclusive.

In *Truax v. Corrigan*, 257 U. S. 312, this Court say:

“The facts alleged are admitted by the demurrer, and, in determining their legal effect as a deprivation of plaintiff’s legal rights under the fourteenth Amendment, we are at as full liberty to consider them as was the state Supreme Court.”

In the same case, the court said:

“In view of these decisions and the grounds upon which they proceed, it is clear that in a case like the present, where the issue is whether a state statute, in its application to facts which are set out in detail in the pleadings and are admitted by demurrer, violates the federal constitution, this court must analyze the facts as averred and draw its own inferences as to their ultimate effect, and is not bound by the conclusion of the state Supreme Court in this regard. The only respect in such a case in which this court is bound by the judgment of the state Supreme Court is in the construction which that court puts upon the statute.”

In the case at bar, the facts all stand admitted. The state Court has construed the statute as applying to the business of the plaintiff in error and as not similarly burdening business conducted by others under similar circumstances. It is for this Court to draw its own inferences as to the ultimate effect of the statute and, giving effect to the declaration by the state Court that the statute applies to plaintiff in error and not to others

conducting the same business, determine from the admitted facts, whether the constitutional rights of the plaintiff in error are or are not infringed.

Any declaration of the Supreme Court of Illinois that the tax is of a certain kind or form, is not binding. This Court will look to the substance and not to the form, and "the controlling test is to be found in the operation and effect of the law as applied and enforced by the state."

St. Louis, Southwestern R. R. Co. v. Arkansas,
235 U. S. 350.

The rule was also stated in another case in this court as follows:

"* * * The decision of the state court is controlling as to the persons upon whom the statute fixed the responsibility. It was the province of that court to determine what the terms of the statute authorized, commanded or forbade, and it is for this court to say whether, in view of its operation, thus delimited, it conflicts with the Federal Law."

Clement National Bank v. Vermont, 231 U. S.
120.

The summary holding demanded by the motion of defendant in error herein, upon the ground that this Court is precluded from inquiring into the character and nature of a tax because it has been styled by the courts of a state to be of a particular kind or nature, would entirely inhibit inquiry by this Court as to whether constitutional rights have been abridged by a statute, although this Court might deem the legal effect, as viewed from the aspect of its constitutionality, to be a clear deprivation of a right guaranteed by the constitution. Such a conclusion would be equivalent to an abdication by this Court of any right of review of decisions of courts of the various states.

II.

The tax under review is a property tax. The cases cited by defendant in error are cases involving licenses or taxes made conditions for doing business in the state, and are not in point.

The defendant in error as a chief ground for the motion to affirm presents the proposition that the legal questions arising on the record have been settled, by numerous decisions of this Court, adversely to the claim of the plaintiff in error.

The premise upon which the defendant in error bases his argument is the assumption that the question involved is the right of the State of Illinois to prescribe the terms and *conditions* upon which foreign corporations may enter the State of Illinois to conduct business there. The premise is false and therefore the conclusion is unsound. It is conceded that the right exists in the state by virtue of its police powers to prescribe the *conditions* for entry of a foreign corporation into a state to do business there. It is not questioned that in imposing conditions precedent upon such entry, terms may be imposed upon foreign corporations seeking entry, more onerous than those which are imposed by the state upon domestic corporations, and the classification of corporations as domestic on the one hand and foreign on the other is a reasonable classification for such purpose.

Section 30 of the Act of 1869 (Brief of defendant in error 33), under provisions of which the tax herein involved was levied, does not exact a license or privilege fee and its payment is not made a condition of doing business in the State of Illinois. It is a revenue tax law, imposed upon corporations which have been admitted to do business in the state. It is not imposed by virtue of the

police powers of the state, but by virtue of the sovereign power of the state to exact support by taxation from property lawfully within its borders by laws which must be imposed equally upon all property of the same kind undertaken to be taxed. The tax is essentially a property tax and not a privilege tax. Whether it is a tax upon the premiums themselves, or whether it is a tax upon the income derived in the form of premiums from conduct of business are not matters of moment. Whether it be called a "business tax," "tax on income," or "personal property tax," it is in fact a property tax. The statute itself described it as a tax upon personal property, providing that net premium receipts shall be listed and "subject to the same rate of *taxation* * * * that *other personal property* is subject to at the place where located."

The statute itself provides for the levying of taxes by taxing bodies and distribution of the taxes among various municipal bodies entitled to tax support. The tax is declared by the statute to be a tax which shall be levied in the same manner as taxes are levied upon "other personal property." The cases are many which hold a tax of this character to be a tax upon property, and this identical tax has been declared to be a property tax and not a license tax by the Supreme Court of Illinois in the case of *People v. Cosmopolitan Fire Ins. Co.*, 246 Ill. 442, wherein the Court say:

"The view of counsel that the tax on net receipts is a license to do business in this state, and not a tax, is erroneous. The net receipts are personal property and are to be listed by the Board of Assessors and Board of Review and taxed the same as other property."

In the case of *New York Life Ins. Co. v. Bradley*, 83 S. C. 418; S. C. 65 S. E. Rep. 433, the Court had for consideration a tax upon gross receipts of an insurance com-

pany, which were required to be reported to the tax auditor, who was required to enter and extend them at the same rate per cent as taxes were extended against other taxable property. The tax law was attacked, upon the ground that it was a property tax and not a privilege tax, and that it was violative of the constitutional rights respecting uniformity of taxation of property.

The issue is stated by the Court as follows:

"If the amount paid by the plaintiff to the treasurer of Abbeville county is an exaction prescribed by the statute law of the state as the price or condition of allowing the plaintiff as a foreign corporation to do business in the state, then all the constitutional objections urged against it would be unavailing."

The Court then state the principle that

"The power of the state to exclude foreign corporations includes the power to admit them for any period of time, and to provide as a condition of admission that the privilege of doing business in the state shall be forfeited by any prescribed action or non-action of the corporation * * *."

"The first question, then, is whether the statute law of the state required that the payment by the plaintiff of the sum sued for should be a condition of entering the state, or that after entering the plaintiff should forfeit the privilege of doing business in the state if it failed to make the payment. If the exaction is of this character, then there is no foundation for the suit. If, on the other hand, it is imposed by the statutes of the state as an ordinary property tax, it will be necessary to consider the objections urged that, as a property tax, it is forbidden by the Constitution of the state and of the United States."

The Statute of South Carolina, which is very similar to the one herein, is set forth in the opinion. It reads in part:

"Each agent in this state of any insurance company organized under the laws of any other state

or country, and doing business in this state, shall, annually, in the month of January, or before twentieth of February, return to the auditor of the county in which such agency is located, a sworn statement of the gross receipts of such agency for the year ending on the first day of that month, including, etc. * * * and the company shall be charged with taxes at the place of said agency on the amounts so returned; and the agent shall also be personally responsible for such taxes, and may retain in his hands a sufficient amount of the company's assets to pay the same, unless the same shall be paid by the Company."

After quoting this section, the Court says:

"If nothing else appeared, it seems too obvious for discussion that the tax provided by this section was intended, not as a privilege tax, but as a tax on the property of foreign insurance companies; the gross income collected in the state being deemed by the General Assembly property within the state."

The Court in that opinion further said:

"Distinct from this as a property tax, two privilege or license taxes are in the same act provided for, and called license fees, namely, \$100, and an additional and graduated license fee of an amount equal to one-half of one per cent. on the gross premiums, gross income, or gross receipts. What is still more convincing is that the plan of the legislation is to make any failure to pay a privilege tax result in the forfeiture of the right to do business in the state; and accordingly it is provided that the failure to make returns of gross income to the Comptroller General or the making of a false return, or the failure to pay the sums designated as license fees, shall result in forfeiture of the right to do business in the state. The omission of such a penalty for non-payment of the tax to the County Treasurer is so conspicuous as to indicate a careful design to place the exactions named as license fees in an entirely different class. If this had been intended as one of three exactions for the privilege of doing business in the state, the General Assembly would not have

made the failure to meet either of them result in forfeiture, and carefully avoided providing that result for failure to comply with the third. No doubt the conditions upon which a foreign corporation may enter a state may be implied from the terms of the statute; but here, as we have endeavored to show, the language of the statute, is too plain for implication. It is also significant that Section 1809 not only indicates in positive language that the sum of the gross premiums shall be placed on the tax duplicate as property, but it provides no penalty for the failure to pay the tax levied thereon. Obvious reason is that it was intended the tax should be collected as a property tax, and payment enforced by the remedies already provided by a different statute for that purpose."

In the case of *Parker v. North British & Mercantile Ins. Co.*, 42 La. Ann. 428; S. C. 7 Southern Rep. 599, the Supreme Court of Louisiana had for consideration a law providing for tax upon gross receipts of insurance companies, less certain deductions. In that case the Court said:

"The state, in this matter, is undoubtedly exercising the power of taxation. This power is derived from, and regulated by, the constitution of the state. No matter who may be the subject, or what may be the object, of the tax, the state, in exercising this power, is bound to the requirement of the constitution. That instrument makes no distinction of persons, and a tax which would be unconstitutional if levied on property belonging to citizens of the state is equally unconstitutional as against foreigners, whether individuals or corporations. The decisions of the Supreme Court of the United States holding that the states may impose such terms as they see fit as the conditions of their consent to permit foreign corporations, or corporations organized in other states, to enter and do business in a different state, without thereby violating the Constitution of the United States, have no application to this question. *Paul v. Virginia*, 8 Wall. 168; *Ducat v. Chicago*, 10 Wall. 410; *Doyle v. Insurance Company*, 94 U. S.

535. These decisions only held that state laws of this character, though making discriminations against foreign corporations, did not conflict with those provisions of the Federal Constitution with reference to the privileges and immunities of citizens of different states and the regulation of commerce. No protection of the Federal Constitution is invoked here."

It will be noted that the Court recognize the principle that the state may prescribe the terms and conditions upon which a foreign corporation may be admitted to do business in the state. It will be observed further that the taxing statute is also found in the same statute that regulates insurance corporations. The Court continue:

"The tax is resisted on the ground that it is without warrant under the constitution and laws of the state. The constitution contemplates only two kinds of taxes, viz., property taxes and license taxes. We are not prepared or required to say whether such a tax, if imposed in proper terms, as a license tax would be valid. It is not, or does not purport to be, a license tax. A license tax is not covered or contemplated by either the title or body of the act. The very proceeding taken by the state is one provided exclusively for the collection of property taxes; and under the terms of the pleadings, as well as under the assessment itself, it is claimed and denominated as a tax on property."

The Court also say:

"Then the question, simply stated, is whether a property tax levied upon the gross receipts of a limited and particular class of persons, and not levied upon the gross receipts of any other class, is valid. The plain constitutional mandate that 'all property shall be taxed in proportion to its value' would seem peremptorily to settle this question. If gross receipts be properly subject to taxation, the gross receipts of all or none must be taxed."

In conclusion the Court say:

"As we have heretofore intimated, if this act merely imposed upon the foreign insurance company the duty of paying to the state a certain percentage of its premiums received as a condition of a permissive license to transact business in this state, different questions would be presented. That would not be a tax, and would not involve the exercise of the taxing power. But the imposition here is levied as a tax, assessed as a tax, claimed as a tax by the tax collector, under proceedings provided exclusively for the collection of taxes. It is a distinct exercise of the taxing power, and must be governed by all constitutional requirements and limitations applicable thereto."

While business taxes may be imposed on some classes of business and others exempted from tax at the legislative will, the rule as to such taxes, nevertheless, is that

"a tax on any occupation must reach all who follow it,—all of a class of persons or things."

State v. Harrington, 68 Vt. 622, 35 Atl. 515.

In the case of *Mutual Reserve Fund Life Association v. Augusta*, 109 Ga. 79; s. c. 35 S. E. Rep. 71, the court had for consideration a tax on gross premiums of insurance companies, from which was exempted the tax on insurance written by companies located there but levied on nonresident companies. The Court considered the tax in that case as a business tax and say that:

"Its legal effect is to impose a tax upon the gross premiums of non-resident insurance companies, and exempt the gross premiums of resident companies, if such are now or should hereafter become established in the City of Augusta, while the ordinance remained in force. On the legal question involved Judge Cooley, in his work on taxation (p. 99) says: 'The federal constitution provides that the citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states. The obvious purpose is to preclude the several states

from discriminating in their legislation against the citizens of other states. A state law, therefore, which imposed upon citizens of other states higher taxes or duties than are imposed upon citizens of the state laying them, is void,' citing *Wiley v. Farmer*, 14 Ala. 627; *Scott v. Watkins*, 22 Ark. 556; *Oliver v. Washington Mills*, 11 Allen 268. In construing the constitutional provisions as to the uniformity and ad valorem system to be enforced in this state, this court has repeatedly held that one business may be taxed, and not another. But the requirement as to this kind of taxation is that it shall be uniform upon all business of the same class. * * * It must therefore be held that the ordinance is invalid and that no legal tax could be imposed under it, because of the discrimination made against non-resident companies and in favor of home companies."

In *Wright v. Southern Bell Telephone Co.*, 127 Ga. 227, 56 S. E. 116, the tax was upon the telephone business and was held invalid.

Other cases of like import are:

Hager v. Walker, 128 Ky. 1; s. c. 107 S. W. 254.

Southern Railway Co. v. Green, 216 U. S. 400.

State v. Parr, 109 Minn. 147.

In *Royster Guano Co. v. Virginia*, 253 U. S. 412, the tax law under consideration was an income tax law, or tax on business. By an act approved on the same day, it was provided that Virginia corporations doing no part of their business within such state should be exempted from income tax and ad valorem taxes. The corporation invoked the equal protection clause of the constitution, because it was taxed upon its income within and without the state, while other corporations doing no business within the state were exempted from the income tax. This Court said:

"But the classification must be reasonable, not arbitrary, and must rest upon some ground of dif-

ference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. The latitude of discretion is notably wide in the classification of property for purposes of taxation and the granting of partial or total exemption upon grounds of public policy."

The Court held the classification unreasonable and in violation of the constitutional guaranty and say:

"Nevertheless, a discriminatory tax law cannot be sustained against the complaint of a party aggrieved if the classification appears to be altogether illusory. * * * It is obvious that the ground of difference upon which the discrimination is rested has no fair or substantial relation to the proper object sought to be accomplished by the legislation. It follows that it is arbitrary in effect; and none the less so because it is probable that the unequal operation of the taxing system was due to inadvertence rather than design."

The classification in the case at bar is entirely unreasonable. It is not a classification as between domestic and foreign corporations, because foreign casualty companies writing insurances identical with the plaintiff are exempted from tax upon insurance written upon identical property and at identical rates with insurances written by plaintiff in error. The business of automobile insurance upon the hazards of collision and theft has risen to tremendous proportions, and the plaintiff and the casualty companies are in direct competition, both write large amounts of such insurance. Under the construction placed on this statute by the Supreme Court of Illinois, such insurance when written by the plaintiff is subject to this tax and when written by a foreign casualty company is not subject to this tax. The classification is not made, therefore, on the basis of resident and nonresident corporations, and neither is the tax classi-

fication put upon the basis of the character of insurance written, because insurance when written by one is taxed, and identical insurance when written by another is exempted. A tax is imposed upon automobile theft insurance when written by the plaintiff, because its charter granted by another state is issued under a chapter of the laws of that other state respecting fire, marine and inland navigation insurance companies, while a casualty company organized by the laws of the same foreign state, under a casualty law, is exempted from the tax upon its theft insurance premiums in Illinois. The difference in the charter powers of the two corporations is therefore made the point of distinction, although the charter powers of both permit the writing of theft insurance.

The statute in question by Section 27 imposes license fees in varying amounts to be paid upon entering the state and for the filing and furnishing of certificates of license. Section 30 provides not for license fees or fees made a condition of license, but for revenue to be derived from business conducted by those lawfully in the state. Section 30 requires

“return to the proper officer * * * of the amount of net receipts of such agency for the preceding year which shall be entered on the tax lists * * * and subject to the same rate of taxation for all purposes—state, county and municipal—that other personal property is subject to.”

The character of the exaction so imposed is for the creation of revenue, and is in no way made a condition of doing business in the state. Its terms are entirely variant from those of the privilege law of Illinois (not directly involved herein), to which the plaintiff in error is subject. The latter act is a typical privilege act; is so styled, and provides that every company wishing to do business in Illinois shall

“pay an annual state tax for the privilege of doing an insurance business in this state equal to etc., etc.”

For failure to pay the privilege tax imposed by that law, it is provided that:

“The Department of Trade and Commerce shall have power to revoke the license, etc.”

(Brief of Defendant in Error, 39-44.)

Section 30 has none of the qualities of a privilege tax law imposed as a condition for entry into and the doing of business in the state. Section 30 does not purport to tax any person, and makes no provision who shall pay the tax, but provides that the amount of the net receipts of the agency shall be entered on the tax list subject to taxation, indicating that the tax is upon the proceeds or premiums derived from the business regardless of the entity producing them. The tax here is a tax upon insurance premiums derived in the State of Illinois, and to style it something else does not alter the fact.

Chief Justice Marshall, in considering an argument similar to that made by our opponents, said:

“The state, it is said, may tax occupations, and this is nothing more. It is impossible to conceal from ourselves that this is varying the form, without varying the substance. It is treating a Prohibition, which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself.”

Brown v. State of Maryland, 12 Wheat. 419.

The tax here imposed is upon business conducted by the plaintiff in error, solely for revenue purposes, and is not made a condition of its entering into or license or permission to do business in the state. There is a marked distinction between the rights of a corporation which seeks entry into a state, and its rights under the law

after the state has admitted it to do business. As was said by the Supreme Court of Kentucky:

“The only constitutional requirement exacted of a state in extending this character of privilege to a foreign corporation is that when the foreign corporation gets into the state, its burdens shall be no more onerous than those of domestic corporations for exercising the same character of privilege. A corporation is a person, however, within the meaning of this provision (Amendment XIV) and after a state has admitted a foreign corporation within its jurisdiction the provision will protect it.”

Green v. Kentinia Corporation, 175 Ky. 661; s. c. 194 S. W. 820.

The distinction between cases of the type now before the Court and cases involving privilege fees or taxes exacted as a condition for entering upon business in a given jurisdiction clearly appear from a consideration of the case of

Ducat v. City of Chicago, 10 Wall. 410,

cited by defendant in error and by his counsel, *stated* to present questions which “were not different in substance from those now to be considered.” In that case, an ordinance was involved, which the Court in its opinion says contain provisions which the Court recites:

“The law also in case of default of payment provided that it should be unlawful for a company to transact any business of insurance in the state until payment was made.”

The provision making it a condition precedent to the doing of business is entirely lacking in the instant law, and distinguishes this case from the cases cited by our opponents.

The Supreme Court of Illinois characterizes the tax here under review as a “tax on business,” and disre-

garding the constitutional rights of the plaintiff in error asserts that:

“Having a right to prohibit a foreign corporation from entering the state to do business, it follows that the legislature may exact such compensation for *that privilege* as it sees fit and levy the same in any manner or by any method it chooses.”

By this decision the Supreme Court of Illinois has taken the position that a foreign corporation complying with all of the terms by the state for entering upon the doing of business in the state and paying all taxes for privilege which the legislature sees fit to impose on it, may, in addition, have imposed upon it taxes at will for revenue purposes (not in any way made conditions of the privilege), which may be at any rate which the legislature may see fit to impose and regardless of the tax imposed on others doing the same business in the state. Such a position is untenable. The rule is stated in *Waterman on Corporation*, page 283, as follows:

“A state cannot tax, for the purpose of revenue, a foreign corporation in a mode different in principle from that in which it can tax one of its own domestic corporations. Laws requiring insurance companies and other foreign corporations to file bonds and submit to other exactions, as a prerequisite to their admission in an incorporated capacity into the state, are mere police regulations designed to protect the citizens of the state in which they are engaged from fraud or imposition. But a tax law having revenue for its object is based upon a different principle, which is the right of the government to take as much of the property of the person or corporation as the government may deem necessary for its public wants. The act of taking the property is therefore an acknowledgment of the legal status of the person or corporation whose property is taken; and it is inconsistent with legal principles to hold that a government can recognize the legal existence

of a foreign corporation for the purpose of taxation and at the same time deny such legal existence for the purpose of depriving it of its rights."

To like effect is

Erie Railway Co. v. State, 31 N. J. L. 542.

This Court has stated the intent of the Fourteenth Amendment to the Constitution to be:

"That no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling or condition."

Truax v. Corrigan, 257 U. S. 312.

Plaintiff in error submits that a burden has been laid upon it greater than has been laid upon others in the same business.

III.

CONCLUSION.

The questions involved herein are very important. The Supreme Court of Illinois has, by its decision, imposed an unjust burden upon plaintiff in error many times that which it has ever borne during its time of doing business in the State of Illinois, and from which its competitors are entirely relieved.

This Court need not find us to be right, in order to deny the motion. It need only find that the questions are open to review and the position taken by us has merit.

We ask that the motion to affirm be denied.

CHARLES E. HUGHES,

CHARLES S. DENEEN,

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FREDERICK D. SILBER,

Attorneys for Plaintiff in Error.

APPENDIX.

Chapter 120, Ill. Rev. Stat., Sec. 135:

"All rates for taxes, hereinafter provided for, shall be computed by the county clerk on the assessed valuation of property," etc.

Chapter 120 Ill. Rev. Stat., Sec. 329:

"Personal property shall be valued at its fair cash value, less such deductions as may be allowed by law to be made from credits, which value shall be set down in one column, to be headed 'full value' and one-half part thereof shall be ascertained and set down in another column which shall be headed 'assessed value.' "

Section 22½, Act of 1869:

"If the Auditor has or shall have at any time satisfactory evidence that any annual statement or other report required or authorized by this Act, made or to be made by any officer or officers, agent or agents of any corporation, association or partnership, incorporated by or organized under the laws of any State of the United States or any foreign government, is false, it shall be the duty of said Auditor to immediately revoke the certificate of authority granted on behalf of such corporation, association or partnership, and mail a copy of such revocation to each agent thereof in this State. And the agent or agents of such corporation, association or partnership, after such notice, shall discontinue the issuing of any new policy and the renewal of any policy previously issued; and such revocation shall not be set aside nor any new certificate of authority given until satisfactory evidence shall have been furnished to said Auditor that such corporation, association or partnership is in substance and in fact in the condition set forth in such false statement or report, and that all the requirements of said Act are fully complied with."

Section 23, Act of 1869:

“And whenever it shall appear to the said insurance superintendent from the report of the person or persons appointed by him, that the affairs of any company not incorporated by the laws of this State are in an unsound condition, he shall revoke the certificates granted in behalf of such company, and shall cause a notification thereof to be published in a newspaper of general circulation published in the city of Springfield, and mail a copy thereof to each agent of the company; and the agent or agents of such company, after such notice, shall be required to discontinue the issuing of any new policy and the renewal of any previously issued.”

Section 27, Act of 1869:

“There shall be paid by every company, association, person or persons, or agent, to whom this Act shall apply, the following fees: For filing the declaration or the certified copy of a charter herein required, the sum of \$30; for filing the annual statement required, \$10; for each certificate of authority to agents of companies or associations not incorporated under the laws of this State, \$2; for each certificate of authority to agents of companies incorporated under the laws of this State, fifty cents; for every copy of paper filed in his office, the sum of twenty cents per folio; and for affixing the seal of said office to such copy and certifying the same, \$1; and in case two or more companies shall combine and effect insurance, under a joint policy, each and every company shall pay the fees provided herein, the same as if each company wrote separate and distinct policies: *Provided*, that the net amount of all fees over and above the cost of performing the clerical labor connected therewith shall not exceed, under this Act, the sum of \$5,000, and that any amount above that sum shall be paid over to the State Treasurer: And, *Provided, further*, that the Auditor shall render account, in his biennial report, of the fees received by him under the provisions of this Act.”

FILED

OCT 14 1926

WM. R. STANSBUR
CLERK

No. 179

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1926.

HANOVER FIRE INSURANCE COMPANY,
Plaintiff in Error,

vs.

PATRICK J. CARR, County Treasurer and Ex
Officio County Collector of Cook County, Illi-
nois,

Defendant in Error.

Error to the Su-
preme Court of
the State of Illi-
nois.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

CHARLES E. HUGHES,
CHARLES S. DENEEN,
ROBERT J. FOLONIE,
FREDERICK D. SILBER,

ATTORNEYS FOR PLAINTIFF IN ERROR.



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REPLY BRIEF FOR PLAINTIFF IN ERROR.

In this reply brief the plaintiff in error adopts the subdivisions in argument used by the defendant in error in its brief.

I.

In the caption to Point I the defendant in error says (Brief 10) that "The State of Illinois had the right to prescribe the terms and conditions upon which plaintiff in error might transact business within the borders of the State." This statement is subject to an important limitation, which the defendant in error recognizes in the body of this argument. (Brief 11.) As this Court has stated in *Terral v. Burke Construction Co.*, 257 U. S. 529, 66 L. Ed. 352, 354:

"The sovereign power of a state in excluding foreign corporations, as in the exercise of all others of its sovereign powers, is *subject to the limitations of the supreme fundamental law.*"

The defendant in error cites as its first and apparently its chief case under the caption, the case of *Horn Silver Mining Co. v. New York*, 143 U. S. 305, 36 L. Ed. 164, and makes the statement that every argument brought forward in behalf of the plaintiff in error in the case at bar was advanced and denied in that case.

The opinion in that case is by Mr. Justice Field. It was decided in 1891. The tax there under consideration was an excise tax of a certain percentage upon the entire capital stock of the corporation which was foreign to the state of New York, where the matter arose. It was contended that the tax was invalid because it was without regard to the extent of corporate franchises exercised by it in the state or the amount of business done within the state or the amount of capital employed, or the amount of its capital stock held in the state, and the extent of protection and benefit derived from its laws and agencies, and because it sought to tax property not within the jurisdiction of the state or in any way subject to its authority and that the tax violated the principles of equality and uniformity.

The Court, in denying the validity of these contentions, stated its position to be that:

"having the absolute power of excluding the foreign corporation, *the state may of course impose such conditions upon permitting the corporation to do business within its limits as it may judge expedient.*"

The Court further on the last page of the opinion say:

"There seems to be a hardship in estimating the amount of the tax upon the corporation, for doing business within the state, according to the amount of its business or capital without the state. *That is a matter, however, resting entirely in the control of the state, and not a matter of Federal law, and with which, of course, this court can in no way interfere.*"

Such was the law in the then condition of the decisions of this Court. The premises upon which the decision in that

case rests as shown by the quotations from it, have been distinctly retracted and overruled by this Court.

This Court in the case of *Terral v. Burke Construction Co.*, 257 U. S. 529, 533; 66 L. Ed. 352, 354, used the language which we have first above quoted to the effect that the power of the state in such particulars is *subject to the limitations of the supreme fundamental law*. In the *Terral case*, the Court further say:

“It follows that the case of *Doyle v. Continental Inc. Co.*, 94 U. S. 535, 24 L. Ed. 148, and *Security Mut. L. Ins. Co. v. Prewitt*, 202 U. S. 246, 50 L. ed. 1013, 26 Sup. Ct. Rep. 619, 6 Ann. Cas. 317, must be considered as overruled and that the views of the minority judges in those cases have become the law of this court.”

The minority opinions in those cases (which are now the law of this Court) expressly disaffirm the sweeping rule declared by Mr. Justice Field, and we call attention, briefly, to the language of the dissenting opinions in those cases which declare the present state of the law.

The dissenting opinion in the case of *Doyle v. Continental Ins. Co.*, 94 U. S. 535, says:

“Though a state may have the power (if it sees fit to subject its citizens to the inconvenience) of prohibiting all foreign corporations from transacting business within its jurisdiction, it has no power to impose unconstitutional conditions upon their doing so. Total prohibition may produce suffering and may manifest a spirit of unfriendliness toward sister states; but prohibition, except upon conditions derogatory to the jurisdiction and sovereignty of the United States, is mischievous, and productive of hostility and disloyalty to the General Government. If a state is unwise enough to legislate the one, it has no constitutional power to legislate the other.”

This decision also completely answers the argument of counsel in the concluding parts of this point wherein they say (brief of defendant in error, p. 16):

“*The whole is greater than any of its parts. The whole is equal to the sum of all its parts. The power to admit*

upon conditions as to any compensation, whatever those conditions may be, is less than the power to exclude entirely."

In refutation we quote the language of Mr. Justice Bradley, in *Doyle v. Continental*, wherein he says:

"The argument used, that the greater always includes the less and, therefore, if the State may exclude the appellees without any cause, it may exclude them for a bad cause, is not sound. It is just as unsound as it would be for me to say, that, because I may without cause refuse to receive a man as my tenant, therefore I may make it a condition of his tenancy that he shall take the life of my enemy, or rob my neighbor of his property."

In the case of *Security Mut. Life Ins. Co. v. Prewitt*, 202 U. S. 246, 258, the Court had for review a case turning upon the right of a state court, as a condition of admitting a foreign corporation, to prescribe that the licensed corporation shall not remove cases to the federal court. ~~The Court in~~ The minority opinion (now the law of this Court) says:

"In all the cases in which this court has considered the subject of the granting by a State to foreign corporations of its consent to the transaction of business in the State, it has uniformly asserted that no condition can be imposed by the State which are repugnant to the Constitution and laws of the United States." (p. 261.)

The same opinion further says:

"The doctrine that the surrender of rights granted or secured by the Constitution of the United States may be made a condition of the privilege of doing or continuing business within a state is at war with that instrument, and if adopted or sanctioned by all of the states would nullify the supreme law of the land in some of its most essential provisions." (262.)

It is also said in the opinion:

"If a state may lawfully withhold the right of transacting business within its borders, or exclude foreign corporations from the state upon the condition that they shall surrender a constitutional right given in the privi-

lege of the companies to appeal to the courts of the United States, there is nothing to prevent the state from applying the same doctrine to any other constitutional right, which, though differing in character, has no higher or better protection in the Constitution than the one under consideration. If the state may make the right to transact business dependent upon the surrender of one constitutional privilege, it may do so upon another, and finally upon all. In pursuance of the principle announced in this case, that the right of the state to exclude includes the right, when exercised for any reason or for no reason, the state may say to the foreign corporation, 'You may do business within this state, provided you will yield all right to be protected against deprivation of property without due process of law, or provided you surrender your right to have compensation for your property when taken for private use, or provided you surrender all right to the equal protection of laws;' and so on through the category of rights secured by the Constitution, and deemed essential to the protection of people and corporations living under our institutions." (267.)

The opinion further makes the explicit point for which we contend herein, namely, the vital distinction between a privilege or license fee exacted in advance when the company is at the threshold, and non-compliance with which prevents it from coming into a state, and a provision of law or agreement exacted that after it has entered into the state it shall be burdened with exactions which deprive it of the equal protection of the laws accorded to others. The opinion states:

"Furthermore, it is stated in the prevailing opinion (in a case cited) that while the state may exclude in advance or deprive a foreign corporation of the privilege of doing business after it is lawfully in the state because of the exercise of a Federal right, it cannot require the corporation to agree in advance that it will waive such right, as that, it is admitted, would be unconstitutional. We think the distinction is without a substantial difference, and makes the validity of the act turn upon the means of attaining the same unlawful end. In either alternative the corporation is excluded from

the state because it will not consent to surrender the right given it under the Federal Constitution. While we concede the right of a state to exclude foreign corporations from doing business within its borders for reasons not destructive of Federal rights, we deny that the right can be made to depend upon the surrender of the protection of the Federal Constitution which secures to alien citizens the right to resort to the courts of the United States."

The contentions of the defendant in error under Point I, as exemplified in the *Horn Silver Mining case*, are inconsistent with the decision in *Air-way Electric Appliance Corp. v. Day*, 266 U. S. 71, 69 L. Ed. 169. In that case, suit was brought to restrain the collection of a franchise fee charged against it as a foreign corporation for the privilege of exercising its franchise in Ohio. One of the grounds was that it was repugnant to the 14th Amendment in taxing the entire capital, including that not employed in the state. (p. 77.) The Court say:

"When tested, as it must be, by its substance—its essential and practical operation—rather than its form or local characterization, such a license fee or excise fee is unconstitutional and void as illegally burdening interstate commerce and also as wanting in due process because laying a tax on property beyond the jurisdiction of the state."

The concluding language of the opinion is as follows:

"The act has no tendency to produce equality; and it is of such a character that there is no reasonable presumption that substantial equality will result from its application. *Martin v. District of Columbia*, 205 U. S. 135, 139, 51 L. ed. 743, 744, 27 Sup. Ct. Rep. 440; *Gast Realty & Invest. Co. v. Schneider Granite Co.*, 240 U. S. 55, 58, 60 L. ed. 523, 525, 36 Sup. Ct. Rep. 254; *Kansas City Southern R. Co. v. Road Improv. Dist.*, 256 U. S. 658, 660, 65 L. ed. 1151 1156, 41 Sup. Ct. Rep. 604. The act violates the equal protection clause of the 14th Amendment."

The declaration that there must be substantial equality, otherwise there is not equal protection under the 14th Amendment, made in a case wherein *the same issue was involved as in the Horn Silver Mining Co. case*, while not in terms disapproving of that case, is a declaration of the law to the contrary. If the *Horn Silver Mining Co. case* is to be given the broad meaning for which defendant in error contends, then the state may exact any agreement it sees fit as a condition of the privilege of entering the state, including a waiver of the guarantees of the 14th Amendment. If the *Horn Silver Mining case* is properly thus construed, it is not now the law.

In the *Horn Silver Mining case*, the Court held a tax based "according to the amount of its business or capital without the state" was a matter which the federal courts had no right to inquire into, for it rested entirely with the state to do as it pleased, free from federal control.

Defendant in error cites the case of *Ducat v. City of Chicago*, 10 Wallace 10, and from its statement of the facts, and the summary statement in that decision, attempts to draw the inference that the law, which was for consideration in that case, bears similarity to Section 30 here for consideration. That such is not the case is best disclosed by giving to the Court the language of the tax law there before the Court. It is as follows:

"All corporations, companies and associations not incorporated under the laws of this state, engaged in said city (Chicago) in effecting fire, marine or life insurance, shall pay to the city treasurer, a sum of \$2.00 upon the \$100 and at that rate upon the amount of all premiums which during the half year ending on every first day of July and January shall have been received * * * every person who shall act in said city as agent * * * shall on or before the 15th day of July and January in each year render to the city comptroller a full, true and just account, verified by his oath of all premiums which during the half year ending on the first day of July and January preceding such report shall have been received by

him. * * * Said agents shall also pay over to the city treasurer at the time of rendering the aforesaid account, the amount of rates for which the company or companies represented by them are severally chargeable by virtue hereof. If such account be not rendered on or before the day hereinbefore designated for that purpose, or if the said rates shall remain unpaid after that day, it shall be unlawful for any corporation, company or association so in default, to transact any business of insurance in said city, until the said requisitions shall have been fully complied with * * *." (Private Laws of Illinois, 1863, Charter of City of Chicago, p. 98, Chap. 8, Sec. 5.)

In the *Ducat* case

- (1) This statute was not like the statute here involved but like the two per cent privilege tax statute of Illinois of June 28, 1919 (Brief for plaintiff in error, p. 99), with which it is conceded that plaintiff in error has complied.
- (2) The tax was in a fixed amount or rate and not a going property tax rate.
- (3) The value did not enter as an ingredient into the mass of property the relationship between which and the tax needs of the state fixed the tax rate.
- (4) The tax was not imposed and collected by general tax officers.

In the case at bar:

- (1) The payment is a condition subsequent, if it is any condition whatsoever.
- (2) The tax is at variable rates dependent upon the governmental support required in various jurisdictions.
- (3) The value of the net receipts is an ingredient of taxable values, the sum of which in relation to tax requirements fixes the rate.

- (4) The tax is imposed by tax assessors charged with property assessment and collected through the property tax collector.

Whatever the *Ducat case* may have decided, it clearly has no bearing on the issues here.

Fidelity & Deposit Co. of Maryland v. Taffoy, 46 Sup. Ct. Rep. 331 (U. S. Sup. Ct. advance opinions, April 1, 1926, p. 378), was a case in which a license was sought to be canceled because, in violation of the statute, the company had made payments to agencies in other states in connection with business written in the licensing state. In that case, the statutory provision was clearly made a condition of doing business, and it also provided that licenses were to be suspended if the act were violated. The Court holds that the apparent right to exclude a foreign corporation without any reason is qualified, and one qualification is that it may not be used as "part of a scheme to accomplish a forbidden result."

The Court sums up other cases upon the subject as follows:

"Thus the right to exclude a foreign corporation cannot be used to prevent it from resorting to a Federal Court. (*Terral v. Burke Constr. Co.*, 257 U. S. 529, 66 L. ed. 352, 21 A. L. R. 186, 42 Sup. Ct. Rep. 188); or to tax it upon property that by established principles the state has no power to tax. (*Western U. Teleg. Co. v. Kansas*, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190, and other cases in the same volume and later that have followed it.)"

II.

Under this point, it is contended that when the plaintiff in error entered into the State of Illinois, it knew of the existence of Section 30 and that if it was unwilling to abide by the unconstitutional statute "it should have stayed out." It was not bound to stay out or alternatively submit to un-

constitutional exactions which by levy of the tax were imposed upon it after it had been legalized to do business.

The argument under Point I fully answers Point II. We call attention only to one matter, namely, that in reciting the provisions of the General Revenue Act, the brief of defendant in error (p. 17) omits the language of Section 3 of that revenue act wherein it is provided respecting *domestic* corporations that:

“Where tangible property or capital stock of any company is assessed under this act, the shares of capital stock of such company or association shall not be assessed or taxed in this state.”

The stock of plaintiff in error and other *foreign* corporations is subject to tax against the holders thereof in Illinois.

III.

Under this point the defendant in error urges that “the obligation of plaintiff in error is a contract obligation, the presumption being that when it accepted and exercised the privilege, it assented to the obligation to pay the tax in question.”

To sustain the point, defendant in error says that the equal protection clause of the 14th Amendment “was designed to protect individuals and corporations against acts of a state to which they did not consent and not to relieve them from obligations to a state which they might voluntarily assume.” The questions argued under this point are in the main directed to the insistence that the duty to pay the tax is contractual and not *in invitum*. The point has no relevancy to a decision of this case. If the tax exaction sought to be enjoined is an unconstitutional exaction, either because the statute violates the 14th Amendment or because its application by the taxing body purporting to follow the statute does so, in either event the exaction is void.

If the statute is valid and its application does not contravene the 14th Amendment, then the plaintiff in error may not complain whether the act is *in invitum* or pursuant to contract. Hence, it does not matter whether the plaintiff in error did or did not agree by contract to pay the tax.

It is obvious that the question whether the rights are or are not contractual obligations, might assume material proportions in suits brought by the state for back taxes where questions of limitations, laches, contemporary construction of courts and administrative officers would have a different bearing than they have herein.

The defendant in error evidently hopes to gain advantage of expressions of this Court herein for their use in other litigation upon questions which are of no materiality to the determination of this case.

We are compelled, notwithstanding our protest that the question is foreign to any proper matter here for consideration, to meet the point presented.

The equal protection clause of the 14th Amendment does protect individuals and corporations from agreements exacted from them as conditions for doing business in a state when such exactions are violative of the rights guaranteed by the 14th Amendment.

See:

Terral v. Burke, and other cases cited under Point I,
supra.

The plaintiff in error herein does not invoke the aid of the courts to enjoin violation of a contract which it asserts it had with a state, nor is the provision of the constitution as to impairing the validity of contracts, involved. Cases like *American Smelting & Refining Co. v. Colorado*, 204 U. S. 103 (brief of defendant in error, p. 24), and other cases cited, are not here in point. In general, they fall in the classification of *State v. Chicago & Northwestern Ry. Co.*,

128 Wis. 449 (brief of defendant in error, p. 27), where a franchise is conferred on a public utility upon certain terms and conditions, which it expressly accepts. In such a case there is a contract in the proper sense of the word. Here there is no contract in any other sense than that every person impliedly agrees to obey the law. In this sense every legislative enactment imposed on citizens *in invitum*, would be a contract. The distinction is well expressed by the Supreme Court of Georgia in *Lane v. Morris*, 10 Ga. 162, as follows:

“Is the liability of the defendant created by contract either expressed or implied, or is it a liability created by the express enactment of the law?”

The question under this point is whether the liability is imposed by statute or by the contract of the parties pursuant to the statute.

As this Court said in *Clapp v. Wilmott*, 193 U. S. 613:

“If a liability be wholly imposed by a statute, it has come to be described as arising out of a specialty. Such was the case in *Fidelity v. Arl. Etc. Company*, 190 Fed. 55. But where a statute is only a factor in the liability and the factor no more essential than is the defendant's contract, I think it may well be doubted whether such a liability is properly described as arising by specialty.”

A typical case of a contract is exemplified in the case of *State v. Illinois Central Railway*, 246 Ill. 188, where in a charter granted to the railroad by special act of the legislature, it was provided:

“In consideration of the grants, privileges and franchises herein conferred upon the company for the purposes aforesaid, the company shall * * * pay into the treasury of the State of Illinois five per centum on the gross or total proceeds.”

The railroad expressly accepted such franchise. When the plaintiff in error complied with the provisions of the Licensing Act of Illinois by filing its charter, paying license fee, filing proof of its solvency, etc., these were all conditions

which the state exacted and which were complied with before a license was issued. It might be contended that the obligation to pay the license fee provided by that Act, as distinguished from the tax under Section 30, was impliedly contracted for by acceptance of the offer of the state. The tax here in question, however, was not imposed contemporaneously with or before issuance of the license, and differs in no particular in its nature from any other tax upon property. It is true, that every person, foreign and domestic, having property in a state, subjects such property to taxation by its mere presence there. He does not, however, contract to pay the tax in any legal sense, but the tax is exacted from him whether he wills or not, and may be collected in spite of his protest.

The effort is to give validity to an unconstitutional exaction by clothing it as a contract. This Court has spoken clearly as to its views respecting such contentions.

In *Frost v. Railroad Commission* (Advance Opinions, July 1, 1926, p. 682), 46 Sup. Ct. Rep. 605, the private carrier by automobile, which could not operate its automobile without securing a license, had imposed upon it the additional burden of securing a certificate from the commission as a condition of carrying goods on the highway. It was then argued and decided by the Supreme Court of the state:

"that the state had the power to grant or altogether withhold from its citizens the privilege of using its public highways for the purpose of transacting private business therein; and that, therefore, the legislature might grant the right on such conditions as it saw fit to impose."

The question in this case the Court says is therefore:

"The naked question which we have to determine therefore, is whether the state may bring about the same result by imposing the unconstitutional requirement as a condition precedent to the enjoyment of a privilege, which, without so deciding, we shall assume to be within the power of the state altogether to withhold if it sees fit to do so."

The Court says that there are two powers involved, one

“The power to prohibit the use of the public highways in proper cases—the state possesses; and the other—the power to compel a private carrier to assume against his will the duties and burdens of a common carrier—the state does not possess.”

It was contended, however, that it was made a condition of the right to use the highways and the Court say of this:

“May it stand in the conditional form in which it is here made? If so, constitutional guaranties, so carefully safeguarded against direct assault, are open to destruction by the indirect but no less effective process of requiring a surrender, which, though in form voluntary, in fact lacks none of the elements of compulsion. Having regard to form alone, the act here is an offer to the private carrier of a privilege, which the state may grant or deny, upon a condition, which the carrier is free to accept or reject. In reality, the carrier is given no choice, except a choice between the rock and the whirlpool,—an option to forego a privilege which may be vital to his livelihood, or to submit to a requirement which may constitute an intolerable burden.”

The Court further say:

“If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties imbedded in the Constitution of the United States may thus be manipulated out of existence.”

The Court used this significant language in the case after citing many cases:

“And the principle, that a state is without power to impose an unconstitutional requirement as a condition for granting a privilege, is broader than the applications thus far made of it.”

The rule is not, as contended by the defendant in error, that because the state may exclude plaintiff in error entirely, that therefore it may burden its entrance into the state with an obligation in violation of the federal constitution. Nor is the rule otherwise if its guise is that of a “contract.”

IV.

Defendant in error under this point discusses the subject as stated by it that

“The tax provided for by Section 30 of the Act of 1869 is a privilege tax and not a property tax.”

As this point has been presented in our original brief, we shall not reiterate what we have said there.

The first case cited by defendant in error is that of *Ohio Tax Cases*, 232 U. S. 576 (58 Law Ed. 737). The violation of the equal protection clause was there invoked because the four per centum tax levied against all railroads:

- (a) Does not include all other public utilities such as grain elevators, inn-keepers, etc.
- (b) That it does not operate uniformly among the utilities that are taxed, since gas companies, telephone companies, etc., are taxed at a lower rate of their gross earnings, while on railroads, including plaintiff in error's, it is four per centum of such earnings.

If the contentions here were that the law is invalid because the burdens placed upon certain insurance companies are not also placed upon banks, etc., the case would have point. We respectfully submit that if, in the *Ohio Tax Cases*, some railroads had been subject to tax and others free therefrom, an entirely different conclusion might well have been reached.

The case of *Pullman Company v. Knox*, 235 U. S. 23 (59 L. Ed. 105), cited by defendant in error, does not decide any point involved herein. The decision of the Court is in substance that arbitrary classification is claimed because the gross receipts of sleeping car and parlor car companies are taxed, but no tax is imposed upon railroads operating their own sleeping and parlor cars. The Court says:

“If otherwise this were a valid objection as to which we need express no opinion, it is enough to say that a

tax is not to be upset upon hypothetical and unreal possibilities, if it would be good upon the facts as they are.

Keokee Consolidated Coke Co. v. Taylor, 234 U. S. 224 (58 L. Ed. 1288; 34 Supreme Court Reporter 856).

It does not appear that any railroad in Florida does operate its own sleeping or parlor cars, and the Attorney General of the state denies that such a case exists."

This is all that there is in the case bearing upon the federal constitution. We respectfully submit that it does not permit of the conclusions which the defendant in error seeks to draw from it.

The case of *Oliver Iron Mining Co. v. Lord*, 262 U. S. 172 (67 L. Ed. 930), which is cited by the defendant in error in its brief (p. 42), contains language which the defendant in error does not call to the attention of this Court, which we regard as the most significant part of the opinion (see opinion, p. 179):

"The contention made under the Equal Protection provision of the 14th Amendment and under the State Constitutional provision that 'taxes shall be uniform upon the same class of subjects' present a question of classification and have been argued together.

Consistently with both provisions the Legislature of the state may exercise a wide discretion in selecting the subjects of taxation, particularly as respects occupation taxes. It may select those who are engaged in one class of business and exclude others *if all similarly situated are brought within the class and all members of the class are dealt with according to uniform rules.*"

The defendant in error says (brief of defendant in error, p. 45) that it has been determined that the tax under Section 30 must be computed upon the full amount of net receipts without debasement or equalization.

"That decision as plaintiff in error concedes being a construction of a state statute, is binding upon this court, as well as is its decision that Section 30 is not in conflict with the Illinois constitution."

We understand the quoted language to mean that this Court is bound by the determination that the statute requires the tax to be based upon one hundred per centum of the net receipts. We do not, of course, concede that the statute as so construed, is valid, or that such action is consistent with the guarantees of the federal constitution, and we do not understand that the defendant's language as quoted contemplates such a claim.

The defendant in error seems to make a considerable point of the statement of the Supreme Court of Illinois in the case at bar, that the tax under Section 30 is one of "the requisitions of the act" (brief of defendant in error, p. 47). The word "requisitions" merely means the demanding a thing to be done by virtue of some right.

Bouvier's Law Dictionary, (Rawles third revision)
Volume 3, p. 2904.

When the governor of a state makes "requisition," he makes a demand. It is not in question that the State of Illinois demands the tax fixed by Section 30. The word has no other or obscure meaning, as the defendant in error seems to suppose.

V.

The next point made by the defendant in error is captioned

"Whether the tax in question is a privilege tax or a property tax is immaterial."

The gist of this point is set forth in the brief of defendant in error, page 50, where it says:

"What then is there to hinder the state from providing that if a foreign corporation such as the Hanover Company, carries on business within the borders of the state, it shall pay a tax upon the real and personal property which it owns within the state, twice as high as that which a domestic corporation is required to pay upon its property, or pay a tax upon a species of property upon which

other persons are not required to pay taxes? The State constitution might prevent such a tax, but the 14th Amendment would not."

The foregoing statement is equivalent to a statement that if a state has a right to prevent foreign corporations from entering the state at all, then in levying taxes upon property within its borders, it may tax the property of one at one rate and intentionally and deliberately tax the property of another, identical in its every quality and character, at an entirely different and higher rate. The 14th Amendment prohibits such action.

Raymond v. Chicago Union Traction Co., 207 U. S. 20.

52 L. Ed. 78; 28 Supreme Court Reporter 7; 12 Annotated Cases 757, and cases cited.

It is tantamount to a statement that no constitutional limitations are applicable to the power of a state to levy property taxes, for defendant in error asserts, that assuming the present assessment to be a property tax, there is nothing to hinder the state from requiring payment of twice as much property taxes on property of plaintiff in error within its borders as others pay upon like property. In other words, counsel assert that there can be no such thing binding upon a state as equal protection of the law invoked by a foreign corporation. To press the argument to its logical end, every foreign corporation as far as property taxes are concerned, is outside the protection of the constitution. And, to make it more extreme, counsel close the paragraph by declaring that the state constitution might prevent such a tax, but the federal constitution stands powerless before it.

The position of the defendant in error is that taxes upon like property may be assessed at different rates, not because the property in one case differs from the property in another, but because the casual ownership is in a different entity, and

that this is a just reason for classifying its property as subject to a higher tax. This overlooks the theory which underlies all taxation of property, that the taxation of property is directed against the property itself, and classifications in case of property taxes to be just, must be classifications of property. The fact that the tax may be assessed in the name of a given person as its owner, or that he may be charged because of his relationship to it, arises merely out of his relationship to the property, and not because the tax in such a case is levied upon him as a person. If the tax be conceded to be a property tax, (as defendant concedes for the purpose of this point), no classification may justly be made which takes into account the characteristics of the temporary owner of the property at the taxing date.

But if on the other hand, the tax be held to be a privilege, occupation or business tax, then counsel is confronted with the language of this Court taken from his own citation,

Oliver Iron Mining Co. v. Lord, supra,

wherein this Court declares that in selecting for occupation taxation, the tax authorities may include some and exclude others, provided that *all similarly situated are brought within the class and all members of the class are dealt with according to uniform rules.*

The defendant in error sees similarity to the present case in the decision of this Court in the case of *Oliver Iron Mining Co. v. Lord*, 262 U. S. 172, 67 L. Ed. 930, (brief of the defendant in error, p. 42). That case widely differs from the one at bar, in that in the case at bar, the imposition on its face is a *property* tax and is levied, assessed and collected as a property tax, and the amount varies in each part of the state in accordance with the tax rate there obtaining. In the case cited to the contrary, it was provided that "every person engaged in the business of mining or producing iron ore should pay to the state an occupation tax equal to 6 per cent of the valuation of all ores." It was described, and in its essence,

was an occupation tax. For the purpose of refreshing the memory of the Court at this point, we again call attention to the essential language of Section 30 of the Illinois statutes which is the basis of the present litigation and which reads:

“Every agent of any insurance company, incorporated by authority of any other State or government, shall return to the proper officer of the county, town or municipality in which the agency is established, in the month of May, annually, the amount of the net receipts of such agency for the preceding year, which shall be entered on the tax lists of the county, town and municipality, and subject to the same rate of taxation, for all purposes—State, county, town and municipal—that *other personal property* is subject to at the place where located.”

It is perfectly apparent, from the reading of the Illinois statute, that it was never intended to make this tax an occupation tax. There is no characterization or description of an occupation; there is no statement of the person or entity who shall pay the tax; there is no provision for the method of the collection of the tax after it has been imposed, except from the inference that it shall be collected by the same machinery and in the same method as other property taxes are collected. In short, there is nothing in this statute from which the Court could say that it was intended to be anything else than its plain language would indicate, namely a property tax.

The tax upon the same premium income in one part of the state will necessarily differ from the tax upon premiums in another jurisdiction, because the tax rate differs in the various parts of the state because of differing public need.

In the *Oliver Iron Mining case*, the burden of the tax was (1) on every person engaged in the business. In this case the burden is not upon any person, but upon property, and the property of some persons engaged in the business is subject to tax and the property of others exempt therefrom. (2) The tax in the *Oliver case* was described as “an occupation tax.” The tax here in question was prescribed at the same

rate as the tax upon "other property." (3) In the *Oliver* case the tax was uniform throughout the state, namely, six per cent on the value of the ore, whereas the tax here upon the same amount of premium income differs in every township in the 102 counties of the state, by virtue of the application of differing tax rates.

We call attention to the significant language in the *Oliver* case where it is said:

"Obviously, a tax laid on those who are engaged in that business and laid on them solely because they are so engaged, as is the case here is an occupation tax."

It would seem equally obvious, that a tax such as that in the case at bar is not an occupation tax because it is not laid on *all* those engaged in the business; is upon property not persons; and not upon persons solely because of engagement in the business of insurance, but also because of the accidental domiciliary status of the person who has an incidental relation to the property sought to be taxed.

To answer specifically the underscored language of the brief of the defendant in error at page 22 of its brief, we reply that:

1. The tax is not laid upon insurance companies, but upon property consisting of net receipts.
2. The statute does not provide who shall pay the tax, and the obligation of the insurance company, owner of the net receipts, arises solely out of its relation to the property taxed.
3. The tax is not imposed solely because of engagement in the business of insurance, as others in the same engagement are exempted. It is imposed because of characteristics inhering in the person of the owner of the property.

A tax imposed upon the receipts of ferries to be levied upon the receipts of ferries run by colored persons from which ferries operated by white persons are exempt, would be no more justifiable as an occupation or business tax than is the tax here in question. *The attributes or characteristics of the*

operator of the business cannot form a just method of classification of either occupation or business taxes.

It is to be noted further, that Section 30 does not provide that it shall rest only upon the companies incorporated as fire insurance companies, but provides that "every agent of any insurance company" shall make a return upon which taxes shall be assessed. The Supreme Court of Illinois has construed this language to apply only to foreign insurance companies incorporated as fire insurance companies, and to exempt other insurance companies, also foreign to the state, (casualty) transacting an identical business under a different corporate title. The difference in the style given them by their charter, is therefore made the point of distinction by the decision of the Supreme Court of Illinois, and this construction makes the statute invalid. (See *Fidelity & Casualty Co. v. Board of Review*, 264 Ill. 11 and *People v. Barrett*, 309 Ill. 53, as to construction by Illinois Supreme Court.)

The Supreme Court of Illinois sustained the exaction herein upon the theory that it was a privilege tax. It was virtually conceded, that if it were a property tax, it was void under the laws of Illinois, as well as under the federal constitution. Under the laws of Illinois, the tax would of necessity be declared void if the assessment in question were sought to be sustained as a property tax, because among other reasons, property is subject to taxation by valuation and debasement by process of equalization and assessment. By the statutes of Illinois, property may be taxed only upon an assessed valuation of one-half of its full fair value. (See appendix to brief of plaintiff in error, p. 97.)

Applying such rules to property tax, the tax would necessarily fall, because the processes applied to other property in the state were not applied to this property. Unquestionably, the Supreme Court of Illinois would have held the tax invalid under the constitution of Illinois and the statutes of that state if it were held to be a property tax. See brief of plaintiff in error, appendix pp. 97 —.

VI.

In discussion of the imposition of tax upon 100 per cent of net receipts whereas other property is debased defendant in error, in its brief at p. 55, says that the tax provided by Section 30 is "one of the conditions upon which the foreign insurance company is permitted to come into the state of Illinois and transact business," and it is asserted that the Supreme Court of Illinois has so held in the case at bar. The Supreme Court of Illinois has not so held, and could not do so, for there would be no warrant for such a finding. To the contrary, the Supreme Court of Illinois says as a justification for its construction, (despite the fact that the tax is not required to be paid as a condition for entering into the state):

"The fact that the tax is a privilege tax does not necessarily require that it be paid as a condition precedent to entering the state. Such condition, being precedent, could of course be met but once."

The defendant in error has set forth the effect of the decision in *People v. Kent*, 300 Ill. 324, (brief of defendant in error, p. 56) as if that case had decided the questions as to tax payments and incidental obligations of tax payment. In truth, that case was a proceeding in mandamus, to compel a return by an agent of a mutual company, and as no assessment could be made or any tax exacted until after such a return had been made pursuant to the writ in that case, the case decides nothing except the duty of an agent to make a return and what he was bound to include in his return.

The first decision of the Supreme Court of Illinois, that the tax upon net receipts should be applied upon any basis different from that applied to other personal property, namely, by assessing it upon its full value without equalization or assessment, was in the year 1922, in the case of *People v. Barrett*, 309 Ill. 53. This decision was made after the current

license to the plaintiff in error was issued but before imposition of the tax upon it. The defendant in error seeks to make it appear that this matter had been previously judicially determined in the case of *People, ex rel., v. Kent*. The decree in the case at bar affirmed by the Supreme Court of Illinois finds against such claim of the defendant in error.

The finding of that decree is that:

“The construction of section 30 so adopted and applied (equalization and assessment) by the various assessing officers, as aforesaid, from the year 1869 down to and including the year A. D. 1922 was first challenged and questioned in a certain action for mandamus in the Supreme Court of the state of Illinois in a certain case entitled ‘The People of the State of Illinois ex rel. vs. The City of Chicago, petitioners, vs. Charles V. Barrett, et al, respondents,’ and known as 13899; that the opinion of the Supreme Court in said cause is reported in Vol. 309 of the official reports and decisions of the Supreme Court of Illinois, commencing at page 53 thereof; and that said opinion as published in said report is referred to and adopted herein as fully as if said opinion were herein fully recited.” (Tr. 42.)

We call attention to the fact that it is expressly found by the decree herein that, until the present tax against the plaintiff in error, all tax assessing bodies in the State of Illinois, including the Board of Assessors and Board of Review of Cook County, have, from the year 1869 until the time of the present tax, applied processes of equalization and assessment “and taxed net receipts equally and uniformly with other personal property and upon the same basis as a like amount in value of personal property.” During all of that time, the same principles, practices, procedures and rules were applied as to the assessment of other personal property. Such conduct was uniform and unbroken through that entire period, and it was entirely unchallenged in any judicial proceeding to challenge the method of assessment so adopted. (Tr. 41, 42.)

VII

We have, in our original brief, anticipated and answered most of the contentions made under this point. The defendant in error asserts (Brief of Defendant in Error 57) that the state may class insurance companies as foreign and domestic for some purposes. This is not questioned. However, the state seeks to tax the property of some insurance companies foreign to the state, and exempts the property of domestic insurers and the property of other insurance companies foreign to the state, (all lawfully in the state by its permission). It does so by a classification based on difference in charter powers not in anyway affecting the character of the business transacted or of the receipts subject to the burden. The classification is, therefore, improper and unconstitutional.

The defendant in error says that it is extraordinary that the statute may have been valid when passed but became invalid many years thereafter. (Brief of Defendant in Error 59.) The invalidity of the statute and of the tax exaction imposed under it, arises in greater part upon the construction which is now adopted by the Supreme Court, whereas the statute differently construed might conceivably have been a constitutional enactment. It is uncontradicted in this case, that the construction now put upon the statute is a new construction which is a complete departure from its administration from the time of the enactment of the statute in 1869 until the imposition of the tax here complained of. (Tr. 41, 42.)

It is said that it is not alleged in the bill nor found in the decree that premiums upon the classes of insurance also written by casualty companies were included in the net receipts of plaintiff in error here complained of. (Brief of Defendant in Error 59.)

The defendant in error is incorrect in this particular. It is alleged in the bill of complaint that the complainant was authorized by its charter to make insurances upon all the

various classes which are also written by casualty companies (Tr. 6); and that during the taxing year in question it did write such classes and collected and received premiums upon them through its agencies in Cook County upon such specified risks (Tr. 6, 7); that the plaintiff in error made a return of its net receipts for its several agencies (Tr. 34); that the Board of Review overruled the protest of the plaintiff in error respecting the necessity of paying tax upon these specified classes (Tr. 35); such written protest which was overruled by the Board of Review and its actions sustained herein is also shown in the record (Tr. 23, 24). The allegations of the bill of complaint that complainant wrote all these various classes and received premiums thereon appears in Paragraph 9 of the bill of complaint, the allegations of which are specifically admitted by the answer (Tr. 28). This admission also includes the admission in the same paragraph that such classes were written contemporaneously by casualty companies. The Court in its decree specifically finds that complainant wrote the various classes in question (Tr. 37); that it so did during the tax year in question; that such classes of insurance were also written by competing casualty companies (Tr. 38); that the aggregate premiums of complainant on these classes also written by casualty companies constitutes a large and substantial percentatge of the net receipts of the complainant (Tr. 39); that the plaintiff in error returned to the Board of Review the amount upon which the tax herein is based, namely, \$90,823.95, which was the net receipts of the several agencies of the complainant in the Town of South Chicago for the year ending April 30, 1923 (Tr. 34). The Board of Review overruled the protest of the plaintiff in error (Tr. 35) wherein the plaintiff in error protested against imposition of tax upon the classes of insurance also written by casualty companies (Tr. 23, 24). The action of the Board in overruling such protest is sustained by the decree here.

VIII.

All of the cases presented under the foregoing subdivisions of the brief of the defendant in error have been noted under our reply under the foregoing sections which will not be here repeated.

IX.

Under this point (Brief of Defendant in Error 66) it says in substance: A foreign corporation cannot complain of an unconstitutional invasion of its property rights after its entry into a state if the unconstitutional statute under which such action is sought to be justified was in existence when the corporation entered the state. A mere statement of the effect of this point is its best refutation.

X.

The defendant in error under this point takes the position that the state may "put any price it sees fit upon the privilege of transacting business within its territory by a foreign insurance company." (Brief of Defendant in Error 73.) Assuming, for the purpose of this point, that such a statement is unqualifiedly true, the defendant upon such premise, bases the conclusion that "the exaction of the *amount*, then, being constitutionally permissible, it would be ridiculous to overturn the statute merely because the method prescribed for computing the amount might be regarded as not the most appropriate."

The attack of the plaintiff in error upon the exaction here under review is not merely a challenge of the method of computation. The defendant in error apparently takes the position that if a given *amount* could lawfully be exacted as a privilege fee as a condition precedent to entering the state,

then a tax in an equivalent amount unconstitutionally levied upon property of the plaintiff in error, or unconstitutionally imposed upon conduct of business which it was authorized to do, is not subject to attack. In other words, if a specified amount might lawfully have been exacted upon entry into the state, an unconstitutional exaction subsequently imposed cannot be complained of, if the amount of it does not exceed what might have been exacted under a constitutional law.

XI.

CONCLUSION.

The defect which permeates the entire argument of the defendant in error is a perpetuation of that committed by the Supreme Court of Illinois in the case at bar, wherein the Court say:

“There is no reason why insurance companies may not be divided into classes, the very point of distinction in which shall be the domicile of such companies, *i. e.*, whether foreign or domestic. The levying of taxes upon foreign fire insurance companies and not upon domestic companies of the same character as compensation for the right to do business is not therefor an infraction of the provisions of the Constitution.”

The Court, in support of this statement, cites cases involving license fees imposed under the police power as conditions precedent to entry into the state. The imposition here under consideration is a tax for revenue and not a regulatory charge by virtue of the police power.

The regulatory license fees imposed as conditions precedent to entry into the state are fixed by other provisions of the law, but the instant imposition is clearly a revenue exaction, the power to impose which arises under the taxing power of the state and not the police power. A classification as be-

tween foreign and domestic companies which could be justified when acts pursuant to the police power are involved is creative of an unjust and arbitrary classification when such distinction is applied in the imposition of a tax for revenue.

Occupation taxes levied for revenue are subject to the rules of classification applicable to property taxes, as this Court recognized in *Royall v. Virginia*, 116 U. S. 572, 6 Sup. Ct. 510, 29 Law Ed. 735, wherein a license tax was imposed upon licensed attorneys in a stipulated sum and made a condition of their continuance in the practice of the law. The Court said of the exaction in that case:

“It is an occupation tax for which the license is merely a receipt and not an authority except in that sense, because it is laid and collected as revenue and not merely as an incident to the general police power of the State which, under certain circumstances and conditions, regulates certain employments with a view to the public health, comfort and convenience. In the latter class of cases, the exactions may be either fees or fines, as they are proportioned to the expense of regulation or laid as a burden upon and a discouragement to the business and not taxes which are levied for the purpose of raising public revenues by means of a contribution either from the person or the property or the occupation of all persons in like circumstances.”

The Court points out the proper method of distinguishing a revenue tax from a license or regulatory fee or tax as follows:

“That the party complying with the statutory conditions is entitled as of right to the license is conclusive that the payment is a tax laid for revenue and not an exaction for purposes of regulation (pp. 581, 582).”

The Court further say:

“The occupation which is the subject of the license is lawful in itself and is only prohibited for the purpose of the license; that is to say, prohibited in order to compel the taking out of a license, and the license is required only as a convenient method of assessing and collecting the tax.

Cooley on Taxation, 407.

Such a license fee was held to be a tax by this court in the cases of

Brown v. Maryland, 12 Wheat. 419.

Ward v. Maryland, 12 Wall. 418.

Welton v. Missouri, 91 U. S. 275."

If, in the *Royall case*, it had appeared that the legislature provided that only male persons should be admitted to the practice of the law and females be barred therefrom, this would have been an appropriate classification under the police power in determining who might practice law. If the legislature had permitted both men and women to be licensed and to practice law and imposed a tax for revenue as an occupation tax in which women lawyers were taxed and men lawyers exempted, or provided that women should be taxed at double the rate of the tax upon men, this would be a denial of the equal protection of the laws. Having made the pursuit of the vocation lawful by both classes, the state may not impose revenue burdens upon one in the occupation from which others pursuing the identical vocation are exempted.

The rule is stated in *Waterman on Corporations*, page 283, as follows:

"A state cannot tax, for the purpose of revenue, a foreign corporation in a mode different in principal from that in which it can tax one of its own domestic corporations. Laws requiring insurance companies and other foreign corporations to file bonds and submit to other exactions, as a prerequisite to their admission in an incorporated capacity into the state, are mere police regulations designed to protect the citizens of the state in which they are engaged from fraud or imposition. But a tax law having revenue for its object is based upon a different principle, which is the right of the government to take as much of the property of the person or corporation as the government may deem necessary for its public wants. The act of taking the property is therefore an acknowledgment of the legal status of the person or corporation whose property is taken; and it is inconsistent with legal principles to hold that a government can recognize the legal existence of a foreign corporation

for the purpose of taxation and at the same time deny such legal existence for the purpose of depriving it of its rights."

The rule so declared virtually by Waterman is identical with the statement of the Court of Appeals of New Jersey in the case of *Eric Railway Company v. State*, 31 N. J. L. 542.

To conclude these observations, we sum up the matter that the State, under its police power, has a right to impose license conditions and fees commensurate with the grant under its regulatory power. When it has done so and has legalized a business to be transacted by persons foreign to the state, it may not, in case of a purely revenue measure, revitalize the police power which it has in this particular exhausted, but is then remitted to its taxing power. The taxing power under which the impositions here in question are imposed is not to be confused with the police power, which is not any proper element for exercise in the imposition. The enactment is, and the impositions of the tax are, valid or invalid, measured by the taxing power of the state. When the taxing power, as here, is concededly laid with intentional and gross inequality, it cannot be sustained consistently with the guaranties of the Fourteenth Amendment to the Federal Constitution.

Respectfully submitted,

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JUL 28 1926

WM. R. STANSBURY
CLERK

No. [REDACTED] 179

IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1925.

HANOVER FIRE INSURANCE COMPANY,
Plaintiff in Error,
vs.

PATRICK J. CARR, County Treasurer and Ex
Officio County Collector of Cook County, Illi-
nois,

Defendant in Error.

} Error to the Su-
preme Court of
Illinois.

BRIEF FOR PLAINTIFF IN ERROR.

CHARLES E. HUGHES,
CHARLES S. DENEEN,
ROBERT J. FOLONIE,
FREDERICK D. SILBER,

ATTORNEYS FOR PLAINTIFF IN ERROR.



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OFFICIAL REPORT OF OPINION DELIVERED IN THE COURT BELOW.

Hanover Fire Ins. Co. v. Patrick J. Carr, County Collector, 317 Ill. 366.

GROUND ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

1. Date of judgment to be reviewed: April 24, 1925.
(Rec. 61.)

2. Specific claims advanced, and rulings made in the lower court, here relied upon as the basis of the court's jurisdiction that the statute of Illinois, styled, "Section 30 of act of March 11, 1869, as amended by act approved May 31, 1879, in force July 1, 1879" (Rec. 9) is illegal, unconstitutional and void, in that it denies to complainant the equal protection of the laws and

deprives it of liberty and property without due process of law;

that the tax assessment made by the Board of Review of Cook County, herein complained of, and purporting to be made pursuant to such statute, denies to the plaintiff in error the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States; (Rec. 12-14)

that the assessment and extension of the tax complained of, taxing property of plaintiff in error in a greater proportion than taxes are imposed against other personal property, takes property without due process, denies to the complainant the equal protection of the laws and thereby violates Section 1 of the Fourteenth Amendment to the Constitution of the United States. (Rec. 12-14.)

Allegations of bill of complaint, (Rec. 10, 11, 12, 13, 14, 15);

protest before the Board of Review. (Rec. 25);
ruling of the trial court against the contentions of the plaintiff in error in these particulars, (Rec. 44);

ruling of the Supreme Court of Illinois, denying the contentions of plaintiff in error respecting its rights under the Fourteenth Amendment to the Constitution of the United States, (Rec. 47);

judgment of the Supreme Court of Illinois affirming the decree of the trial court denying these constitutional rights to the plaintiff in error, (Rec. 61).

3. The provision under which jurisdiction is invoked is section 1 of Amendment XIV to the Constitution of the United States.

4. Cases sustaining the jurisdiction are:

Truax v. Corrigan, 257 U. S. 812.

Western Union Telegraph Co. v. Kansas, 216 U. S. 1.

Frost v. Railroad Comm. of Calif., 70 Law Ed. 682.

St. Louis Cotton Compress Co. v. Arkansas, 260 U. S. 246.

Sioux City Bridge Co. v. Dakota County, 260 U. S. 441.

Greene v. Louisville R. R. Co., 244 U. S. 499.

Myles Salt Co. v. Iberia Drainage Dist., 239 U. S. 478.

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Southern Railway Co. v. Greene, 216 U. S. 400.

Doyle v. Continental Ins. Co., 94 U. S. 535.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1925.

No. 626

HANOVER FIRE INSURANCE COMPANY, }

Plaintiff in Error,

vs.

PATRICK J. CARR, County Treasurer and
Ex Officio County Collector of Cook
County, Illinois,

Defendant in Error. }

Error to the Su-
preme Court of
Illinois.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

This is a writ of error brought by Hanover Fire Insurance Company, an insurance company incorporated by the laws of New York to do a business of fire, marine and inland navigation insurance and allied insurance against various hazards.

This writ is directed to the Supreme Court of Illinois to review a judgment of that court affirming a decree of the Superior Court of Cook County, Illinois, dismissing a bill in chancery for want of equity.

The suit in the Superior Court of Cook County was for an injunction against Patrick J. Carr, County Treasurer and *ex officio* County Collector of Cook County, Illinois. The permanent injunction sought by the bill and denied by the action of the courts of Illinois was to restrain the collection of taxes embodied in a tax bill in the hands of the defendant

for collection. The tax bill was for certain taxes for the year ending April 30, 1923, and extended against plaintiff in error by virtue of orders made by the Board of Assessors and the Board of Review of Cook County, Illinois.

The Board of Review and the Board of Assessors, respectively, are taxing bodies with jurisdiction under the statutes of Illinois to assess taxes upon property within the county for support of the Government of the State of Illinois and subsidiary governmental subdivisions in said county.

The tax in question herein was levied and extended solely upon the authority of a statute of Illinois (Rec. 40), the terms, provisions and the nature of the impositions of which present the primary matter here for consideration. This statute (hereinafter, for convenience, styled "Section 30") is the thirtieth section of the act of the legislature of Illinois of March 11, 1869. (Reenacted with slight modifications in 1879.) The title of the act of which such section is a part is as follows:

"An act to incorporate and to govern fire, marine and inland navigation insurance companies doing business in the State of Illinois." (Rec. 40.)

Section 30 of the Act of March 11, 1869 is, for convenience, here set forth and is as follows:

"Every agent of any insurance company incorporated by the authority of any other State or government, shall return to the proper officer of the county, town or municipality in which the agency is established, in the month of May, annually, the amount of the net receipts of such agency for the preceding year, which shall be entered on the tax lists of the county, town and municipality, and subject to the same rate of taxation, for all purposes, state, county, town and municipal that other personal property is subject to at the place where located; said tax to be in lieu of all town and municipal licenses; and all laws and parts of laws inconsistent herewith are hereby repealed; Provided, that the provisions of this section shall not be construed to prohibit cities having an organized fire department from levying a tax, or li-

cense fee, not exceeding two per cent in accordance with the provisions of their respective charters, on the gross receipts of such agency, to be applied exclusively to the support of the fire department of such city." (Rec. 40.)

Cahill's Ill. Rev. Stat. 1925; Ch. 73, Sec. 159—P. 1405.

All questions of local practice are eliminated by the pleadings, the answer filed by the defendant admitting expressly that if the position of the plaintiff in error as to the character and legal effect of Section 30 is correct, then complainant is entitled to a decree permanently enjoining the tax. (Rec. 29.)

A temporary injunction was granted restraining collection of the tax, which was later dissolved (but continued in force pending appeal under provisions of the Illinois Statute authorizing such action). The prayer of the bill for a permanent injunction restraining the collection of the tax was denied, and the bill ordered dismissed for want of equity. (Rec. 45.) All the material allegations of fact in the bill of complaint are expressly admitted by the answer, (Rec. 25) so that the question presented is one arising alone upon the legal conclusions proper to be drawn from such admitted facts.

The facts so admitted, and in the light of the existence of which relief was denied to the complainant, are as follows:

(a) The complainant is an insurance corporation organized under the laws of the state of New York. By its charter it is authorized to do a business of insurance against the hazard of fire, marine perils, inland navigation, tornado, theft, explosion, property damage to automobiles and other property by collision, etc., crop insurance and other similar lines of insurance against specified hazards. (Rec. 1.) For a long time prior to 1922, and during the tax year ending April 30, 1923, the plaintiff in error was licensed by the

proper authorities of the state of Illinois, and admitted to do business in that State. (Rec. 1-26.) Its continuous conduct of such business was done under license annually renewed in July of each year. The plaintiff in error complied specifically with an Act of the General Assembly of the state of Illinois, providing for payment of a privilege tax in that state which is entirely distinct from Section 30 *supra*. (Rec. 1-26.)

The privilege law under which the plaintiff in error was so licensed is the Act of July 1, 1919, the title to which is "An Act in relation to the taxation of non-resident corporations, companies and associations for the privilege of doing an insurance business in this State." (See appendix page 99.)

Ill. Rev. St. (Cahill's) 1925, Ch. 73, Sec. 79 *et seq.*
P. 1390.

The plaintiff in error lawfully did business in the state of Illinois, for the year immediately preceding April 30, 1923, and had complied with all the conditions for entering upon and doing business in the state of Illinois. (Rec. 31-32.)

The tax here in question was an imposition pursuant to section 30 of Act of March 11, 1869, and was for the tax year ending April 30, 1923, being a tax upon the net premiums received by the plaintiff in error in the town of South Chicago in Cook County, during such preceding year. The net receipts of the plaintiff in error for such tax year upon all classes of insurance written by it were \$90,824. (Rec. 36.) Applying the going tax rate upon property to such net premium receipts without any process of debasement would be productive of a tax of \$7184.18. (Rec. 43.) After correction of clerical errors made by the Board of Review, the Court's decree permits the collection of taxes from the plaintiff in error in the sum so named. (Rec. 45.) In so taxing net receipts upon the full amount thereof, the Board of Review

departed from the process of taxation applied by it to other personal property. In assessing other personal property, the statutory method of taxation is to debase or reduce the fair cash value of property one-half and apply the going tax rate to such debased amount (called the "assessed value") which method, if applied to the net receipts of the plaintiff in error, would have been productive of a tax imposition of one-half of the amount so imposed by the Board of Review.

A notice of such tax assessment was sent to plaintiff in error and all other property owners, giving notice that taxes would be assessed at one-half of the fair cash valuation. (Rec. 33.) This notice was pursuant to the statute relating to debasement of property first enacted by Act of July 1, 1898, and as amended in force ever since, which statute is as follows:

"Personal property shall be valued at its fair cash value, less such deductions as may be allowed by law to be made from credits, which value shall be set down in one column, to be headed "full value," and one-half part thereof shall be ascertained and set down in another column which shall be headed "assessed value." * * *

The one-half value of all property so ascertained and set down shall be the assessed value for all purposes of taxation, limitation of taxation and limitation of indebtedness prescribed in the constitution or any statute."

Illinois Rev. St. 1925 (Cahill), Ch. 120, Sec. 329, p. 2042, (Appendix p. 97).

The assessment made by the Board of Assessors was made upon its own information without the making of any return by the plaintiff in error. The Board of Review gave notice to the plaintiff in error that it was required to make to it a return of net premium receipts against which demand the plaintiff in error filed written protest, asserting that section 30 and the proposed action of the Board of Review in undertaking to make an assessment upon net receipts without de-

basement, and the imposition of taxes upon plaintiff in error from which others transacting like business were exempted was a denial of the equal protection of the law under the Fourteenth Amendment to the Constitution of the United States, and was a taking of the property of the plaintiff in error without due process of law. This objection was made in minutely detailed form. (See Exhibit "C", Rec. 21 to 25, Fol. 44.)

The Board of Review overruled such protest and changed the assessed valuation fixed by the Board of Assessors upon a 50% basis to an assessed valuation of 100% of the full, fair value, placing both the full value and the assessed value at \$90,824. (Rec. 35-36.)

Such action infringed the constitutional rights of the complainant in the following particulars:

1. Under the laws of the state of Illinois, provision is made for chartering and organizing fire, marine and inland navigation insurance companies and such companies domestic to the state of Illinois are authorized and empowered to do, and, in fact, do a business of insurance as against the same hazards and risks as is done by the plaintiff in error and other fire insurance companies foreign to the state of Illinois and licensed therein. (Rec. 38.) Such enabling statutes are set forth in Appendix page 100).

Under the statutes of Illinois, (Ill. Rev. St. (Cahill) 1925, Ch. 73, Sec. 447, P. 1446, appendix 97) provision is also made for the doing of business by insurance companies insuring against various hazards (for convenience styled "Casualty Insurance Companies") authorizing the creation of domestic companies and licensing of casualty insurance companies foreign to the state of Illinois. Such casualty companies, domestic and foreign, during the taxing year in question did a business from which they derived more than two millions of dollars of premiums, which insurance was iden-

tical in kind and character with that transacted by plaintiff in error with respect to insurance of automobiles against the risk of fire, transportation risks, theft, collision and other hazards. (Rec. 39-40.) They also made insurance of like kind as that made by plaintiff in error upon hazards of water damage, damage to sprinkler equipments, insurance of crops, live stock and other property against windstorms and hailstorms, all of which classes of business here enumerated are part of the business the net receipts whereof complainant was required by the Board of Review to report, and upon which tax was imposed under section 30. (Rec. 37-38.)

Not only were such concurrent classes of insurance written by domestic fire insurance companies and by casualty companies, domestic and foreign, but such classes of insurance were also written during the same period by individuals, Lloyds associations and aggregations of individuals not incorporated, all of whom were in direct competition with plaintiff in error in Illinois by permission and lawful authority of the state, and all of whom were exempt from tax upon their net premium receipts. (Rec. 46.)

The sole basis of the tax so imposed upon plaintiff in error is the provisions of section 30 of the Act of March 11, 1869. (Rec. 40.) From the year 1869, when section 30 was enacted, to and including the year 1922, all taxing bodies in the state of Illinois, including the Board of Assessors of Cook County and the Board of Review of Cook County uniformly assessed net receipts of fire insurance companies identically as they assessed personal property other than such net receipts. By such uniform and unbroken process and method of assessment, all property, cash in bank and net receipts of foreign fire, marine and inland navigation insurance companies were debased and an assessed value less than the full value fixed to which debased valuation the going tax rate was applied. The same process, practices, procedures and rules

were applied during the entire period of time from 1869 to 1922 inclusive, to cash and personal property of a physical character and to net premium receipts, and such uniformity of taxation was unbroken, consistent and notorious. (Rec. 41.)

The State of Illinois during all this period recognized the propriety of taxation upon like method and principle by giving credit in the amount of tax upon debasement under the retaliatory tax laws, by virtue of which tax payments under section 30 were treated as credits upon retaliating taxes. (Rec. 42.) Act of March 11, 1869, Sec. 29, Appendix p. 93.)

The unchallenged basis of taxing net premium receipts the same as other personal property and debasing them similarly was not questioned in the state of Illinois until the decision of the Supreme Court of Illinois in the case of *People ex rel. City of Chicago v. Charles V. Barrett, et al.*, (members of Board of Review) 309 Ill. 53, (decided in 1923, after license to plaintiff was issued in July 1922 but before making of assessment by the Board of Review), which was a proceeding by way of mandamus by the City of Chicago against the Board of Review of Cook County. (Rec. 43.)

Pursuant to the declarations of the Supreme Court of Illinois in that case, the Board of Review in the tax year in question undertook to follow the directions of the Supreme Court of Illinois, and to tax net premiums on a basis different from that imposed on other personal property.

Not only was property other than net receipts debased by a recognized and uniform process of assessment, but there was an additional debasement by process of equalization, so that in the "full value" column was not entered the amount which was in fact the full cash market value, but other personal property was entered in the statutory "full value" column, at 60 percent. of cash market value and to such figure the 50 percent. assessed valuation was applied, so that the

going tax rate was in fact applied to property other than that of plaintiff in error to approximately 30 percent. of the actual full cash or market value of property. (Rec. 43.)

Had the process of equalization and assessment debasement which was applied to other personal property been applied to the net receipts of the plaintiff in error for the tax year in question, the taxes fixed in the sum of \$7184.18, would have been reduced to the sum of \$2155.24. (Rec. 43-44.) The defendant is the tax collector whose office is created under the Revenue laws of Illinois (not the Insurance Act) for collection of property taxes. There is no provision in the Insurance Act for collection of the tax by any specified officer. Attention is called to the significant fact that the regular property tax machinery for tax collection is employed.

On the foregoing uncontradicted state of the facts, the trial court decreed that the tax assessed against the plaintiff in the sum of \$7184.18 should not nor should any part of it be enjoined; that the acts of the Board of Review did not, nor did the provisions of section 30 of the Act of 1869 as so applied, in any way violate provisions of the Fourteenth Amendment to the Constitution of the United States relating to due process and guaranteeing to the plaintiff in error the equal protection of the laws. (Rec. 44.)

The trial court, having so adjudged and decreed, the matter was removed to the Supreme Court of Illinois by appeal. That court, by divided opinion, affirmed the decree of the Superior court and held against the contentions of the plaintiff in error that its constitutional privileges and guaranties were infringed.

The principal opinion of the Supreme Court of Illinois holds that the constitutional rights of the plaintiff in error are not infringed. (Rec. 46.)

The dissenting opinion declares that the rights of the plaintiff in error under the Fourteenth Amendment to the Consti-

tution of the United States are infringed and denied to it, and that the decree ought to be reversed. (Rec. 54.) A further dissenting opinion takes the position that the statute is constitutional as properly applied but that the tax here assessed is unlawfully laid against plaintiff in error. (Rec. 59.)

The effect of the decision of the Supreme Court of Illinois in the case at bar, in reversing its holdings for more than fifty years, (namely, holdings that the tax in question is a property tax to be levied upon a debased, assessed value), in now declaring that it is properly to be characterized as an excise, taxable upon 100% of the net receipts, naturally arouses an expectation in necessitous municipalities throughout the state of Illinois that they may recover taxes for the unassessed portion of net receipts back to 1869. That such is not an unnatural effect of the decision in question is indicated by the fact that, since the rendering of the decision in the case at bar by the Supreme Court of Illinois, more than two hundred and fifty suits to recover some twenty five million dollars of back taxes to 1869 have been brought in the courts of Illinois against foreign fire insurance companies. The present case, therefore, must collaterally affect much more than the amount directly in issue.

Assigned errors here urged are:

1. Assignments of error, 1 to 13, both inclusive, (Rec. 62-67) are here relied upon. They are naturally grouped into three subdivisions.

2. Section 30, of Act of March 11, 1869, is unconstitutional, in that it denies to plaintiff in error the equal protection of the laws and takes its property without due process of law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

3. The levy of assessment by the Taxing Authorities of Cook County, purporting to act pursuant to section 30, is unconstitutional upon the same grounds.

4. The judgment and the opinion of the Supreme Court of Illinois are in error in holding the statute valid and the tax levy here for review valid, notwithstanding the provisions of the **Fourteenth Amendment**.

SUMMARY OF ARGUMENT.

I.

- (a) This court ascertaining from the decisions of the state court and from the admitted facts in the pleadings, what is the operation of the act, will determine for itself the nature and effect of the statute and whether, in the view of such operation, it infringes the federal constitution.

Truax v. Corrigan, 257 U. S. 312.

Western Union Telegraph Co. v. Kansas, 216 U. S. 1.

St. Louis Cotton Compress Co. v. State of Arkansas,
260 U. S. 346.

Crew-Levick Co. v. Pennsylvania, 245 U. S. 292.

Choctaw O. & G. R. Co. v. Harrison, 235 U. S. 292.

Pullman Co. v. Kansas, 216 U. S. 56.

- (b) If the operation of the law infringes upon guaranties under the **Fourteenth Amendment to the Federal Constitution**, it may not be validated by claims of waiver upon entry of plaintiff into the state or by claim of sovereign right to exclude foreign corporations.

Pullman Co. v. Kansas, 216 U. S. 56.

Terral v. Burke Constr. Co., 257 U. S. 529.

Frost v. R. R. Comm. of California, 70 Law Ed. 682
(June 7, 1926).

Doyle v. Continental Ins. Co., 94 U. S. 535.

II.

Upon its face, **Section 30 of Act of March 11, 1869**, is a revenue measure imposing taxes upon property.

(See analysis of act in argument.)

III.

The history of the act here for review, as well as its context, demonstrates that it was intended to lay a property tax and it has been consistently so administered.

- (a) It was originally enacted as part of a revenue act for taxing property generally.

Revenue Act of February 12, 1853 (Appendix p. 81),
adopted into Sec. 30 of Insurance Act of March
11, 1869 (Brief p. 2).

- (b) The tax has repeatedly been declared to be a property tax by the courts of Illinois.

Walker v. City of Springfield, 94 Ill. 364.

City of Chicago v. Phoenix Ins. Co., 126 Ill. 276.

People v. Cosmopolitan Fire Ins. Co., 246 Ill. 442.

- (c) The statutes upon compliance with which insurance companies are permitted to do business in Illinois are distinct and independent enactments.

See Section 22, Section 22½, Section 23 of Illinois
Statutes, Act of March 11, 1869 (Appendix pp. 84-
92).

Illinois Insurance Privilege Act of June 28, 1919,
(Appendix p. 99).

Licensing Act of 1879 (Appendix p. 93).

Act of June 22, 1893 (Appendix p. 95).

- (d) The courts of Illinois have repeatedly declared that the tax here under consideration is to be administered and applied exactly as taxes upon other property.

Walker v. City of Springfield, 94 Ill. 364.

City of Chicago v. James, 114 Ill. 479.

City of Chicago v. Phoenix Ins. Co., 126 Ill. 276.

National Fire Ins. Co. v. Hanberg, 215 Ill. 378.

People v. Cosmopolitan Ins. Co., 246 Ill. 442.

- (e) The provisions of section 30 of Act of March 11, 1869 are not conditions precedent to doing business in the state.

Fidelity and Casualty Co. v. Board of Review, 264 Ill. 11.

The net receipts subject to tax are personal property and tax thereon is a personal tax.

People ex rel. v. Kent, 300 Ill. 324.

- (f) The provisions of section 30 are not a condition for the doing of business in Illinois by foreign insurance companies.

People ex rel. v. Barrett, 309 Ill. 53.

- (g) The exaction here before the court is not made a condition precedent to doing business, but is a tax burden imposed after the business has been done. The tax is designed to be "in lieu of the taxes that would otherwise be realized from such net receipts as are taken away."

Hanover Fire Ins. Co. v. Carr, 317 Ill. 366.

The tax in question is declared to be a "business tax" and therefore is not a privilege tax imposed as a condition for entry into the state. It is an exaction for raising revenue for maintenance of the government.

Hanover Fire Ins. Co. v. Carr, *supra*.

An occupation tax must operate alike on all persons and corporations engaged in the insurance business, otherwise it denies the equal protection of the laws.

Hanover Fire Ins. Co. v. Carr, (dissenting opinion).
Nebraska Telephone Co. v. City, 82 Neb. 59.

IV.

- (a) A consideration of the general principles applicable to a tax of the type here for review requires determination that it is a tax upon property subject to incidents of property taxation. It has none of the attributes of a license tax, and all of the attributes of a property tax.

People v. Cosmopolitan Fire Ins. Co., 246 Ill. 422.

Thompson v. McLeod, 112 Miss. 383, s. c. 73, So. Rep. 193.

Thompson v. Kreutzer, 112 Miss. 165.

Brown v. Maryland, 12 Wheat. 444.

Phoenix Fire Ins. Co. v. City of Omaha, 23 Neb. 312.

New York Life Ins. Co. v. Bradley, 83 S. C. 418, s. c. 65 S. E. Rep. 433.

Parker v. North British & Mercantile Ins. Co., 42 La. Ann. 428; 7 So. Rep. 599.

- (b) The tax being one for revenue is none the less of that character because it incidentally burdens a class of business.

Bailey v. Drexel Furniture Co., 259 U. S. 20, l. c. 38.

V.

Taxation of the net receipts of plaintiff in error at full value, whereas other personal property was systematically and intentionally valued for assessment purposes at less than full value, operates as a denial of the equal protection of the laws.

- (a) The tax is declared by the opinion in the case at bar to be in effect a commuted tax in lieu of the net receipts taken from the state which, if remaining, would be subjected to the tax.

- (b) **Intentional, systematic undervaluation of all other taxable property and taxation of the property of plaintiff in error at its full value denies to plaintiff in error its constitutional rights.**

Sioux City Bridge Co. v. Dakota County, 265 U. S. 441.

- (c) **The unconstitutional action of the taxing bodies, approved by the Supreme Court of Illinois, in denying the equal protection of the law to plaintiff in error, makes the tax levy and exaction illegal even if the statute be constitutional.**

Greene v. Louisville R. R. Co., 244 U. S. 499.

Reagan v. Farmers Loan & Tr. Co., 154 U. S. 362.

General American Tank Car Corp. v. Day, 70 Law Ed. 239.

Myles Salt Co. v. Iberia Drainage Dist., 239 U. S. 478.

- (d) **Equal protection of the law is not extended by application of uniformity of percentage of rate of tax where there is not uniformity in the basis of value.**

Greene v. Louisville R. R. Co., 244 U. S. 1. c. 512-515.

Cummings v. Merch. Nat'l Bank, 101 U. S. 153.

Exchange Bank v. Hines, 3 Ohio State 1.

People v. Purdy, 231 U. S. 373.

VI.

If the tax be considered as an excise tax upon occupation or business, it is unconstitutional as it is administered and applied.

- (a) It is unlawful for Illinois to impose conditions for the doing of business, in derogation of the guaranties of the Fourteenth Amendment.

Western Union Telegraph Co. v. State of Kansas,
216 U. S. 1.

Fidelity & Deposit Co. v. Tafoya, 46 Sup. Ct. Rep.
331, 70 Law Ed. 379.

Frost v. R. R. Commission of the State of California,
70 L. Ed. 682 (June 7, 1926).

Doyle v. Continental Insurance Co., 94 U. S. 535.

- (b) Plaintiff in error having complied with all conditions precedent to entry into the state thereby became domiciled to such an extent that after being so lawfully in the state it was entitled to equal protection of the laws.

Judson "Taxation" Sec. 178, 2nd ed.

Home Silver Mining Co. v. New York, 143 U. S. 305;
36 L. ed. 164.

Eric R. R. Co. v. State, 31 N. J. L. 542-4.

2 Waterman on Corporations 283.

- (c) The imposition of a business tax whereby one in the business is burdened in a much greater degree than others engaged in the same business is operative to deny equal protection guaranteed by the Fourteenth Amendment.

Cotting v. Goddard, Atty.-Gen., 183 U. S. 79, 46 L.
ed. 92.

Southern Railway Co. v. Greene, 216 U. S. 400-411.

Berry v. City, 320 Ill. 536.

Chalker v. Birmingham & N. W. Ry. Co., 249 U. S. 522.

Truax v. Corrigan, 257 U. S. 312.

Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283-293.

- (d) The classification made by the statute, as construed by the Supreme Court of Illinois, is arbitrary and illusory and has no fair or substantial relation to the proper objects sought to be accomplished by the legislature.

Royster Guano Co. v. Virginia, 253 U. S. 412.

- (e) The imposition herein considered as a business tax violates the constitutional guarantees inuring to the benefit of plaintiff in error.

Mutual Reserve Fund Life Assn. v. Augusta, 109 Ga. 79, 35 S. E. 71.

Wright v. Southern Bell Telephone Co., 127 Ga. 227, 56 S. E. 117.

Pullman Palace Car Co. v. State, 64 Tex. 274, 53 Am. Rep. 758.

- (f) If the State of Illinois can at will deprive insurance companies foreign to the state of the equal protection of the laws and confiscate their property then they in effect nullify the constitution of the United States.

Doyle v. Continental Insurance Co., 94 U. S. 535.

ARGUMENT.

I.

This Court, ascertaining from the decisions of the State Court and from the admitted facts in the pleadings what is the operation of the act, will determine for itself what is the nature and effect of the statute and whether, in the view of such operation, it infringes the Federal Constitution.

The facts upon which this case rests are set forth in detail in the bill of complaint of plaintiff in error, and are, in all essential particulars, admitted by the answer. The decree of the court finds all material allegations of fact in favor of the plaintiff in error. (Rec. 31-46.) The terms of the statute, the history of its enactment, its application and administration from 1869 to the time of imposition of the instant tax, its application in the instant case, the valuation of other property upon a lower basis, the exemption of net receipts of domestic fire insurance companies and casualty insurers, foreign and domestic, from taxation upon like net receipts, are all admitted facts and so found in the decree. (Rec. 31-46.)

This Court must determine for itself the nature and effect of the statute, and of the tax imposed under it, irrespective of any declarations of the Supreme Court of Illinois, wherein that Court in effect states:

1. The nature and legal effect of the statute and characterizes it as a tax upon privilege.
2. The status of plaintiff in error under the Federal Constitution and declaration that it is not a citizen entitled to equal protection of the laws.

3. That the tax upon the net receipts of plaintiff in error on a basis greater than taxation upon other property, and from which net receipts of other insurers deriving net receipts in identical manner are exempted, does not deprive the plaintiff in error of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

In ascertaining whether the plaintiff in error has been denied the equal protection of the laws guaranteed by the Federal Constitution, this Court is bound to proceed entirely regardless of any statements of the Supreme Court of Illinois as to the nature and character of the tax or the nature and character of impositions which the statute imposes. The statement of the Supreme Court of Illinois, that the tax is for the exercise of a privilege, in no way precludes this Court from determining for itself the legal effect of the tax under the admitted facts and the method of its application as shown by the admitted allegations of the pleadings and the approval of the Supreme Court of Illinois of such application of the tax. This Court regards substance rather than form, and no declaration of the state court, or even a statement in the body of a statute that an imposition is a tax for privilege, would bind this Court, but this Court, having ascertained the operation and effect of a statute as applied by the state, its administrative officers and its courts, will determine the nature of the tax for itself.

In the case of *Truax v. Corrigan*, 257 U. S. 312, the Court upon error to the Supreme Court of Arizona had for consideration the constitutionality of a statute respecting picketing and injunctions. The law in substance provided that no presumption of breach of the peace should arise from lawful picketing and the Supreme Court of Arizona construed the statute as creating a rule of evidence only. It was held not within the immunities or provisions of the Fourteenth Amendment. This Court, in declining to adopt such declara-

tion of the effect of the statute as declared by the Supreme Court of Arizona, say (1 c. 324):

"The facts alleged are admitted by the demurrer, and, in determining their legal effect as a deprivation of plaintiff's legal rights under the 14th Amendment, we are at as full liberty to consider them as was the state supreme court. *Mackay v. Dillon*, 4 How. 431, 11 L. ed. 1046; *Dower v. Richards*, 151 U. S. 658, 667, 38 L. ed. 305, 308, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704. Nor does the court's declaration that the statute is a rule of evidence bind us in such an investigation. *Bailey v. Alabama*, 219 U. S. 219, 238, 239, 55 L. ed. 191, 200, 31 Sup. Ct. Rep. 145; *Chicago M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *Mugler v. Kansas*, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273; *Corn Products Ref. Co. v. Eddy*, 249 U. S. 427, 432, 63 L. ed. 689, 693, 39 Sup. Ct. Rep. 325. In cases brought to this court from state courts for review, on the ground that a Federal right set up in the state court has been wrongly denied, and in which the state court has put its decision on a finding that the asserted Federal right has no basis in point of fact, or has been waived or lost, this court, as an incident of its power to determine whether a Federal right has been wrongly denied, may go behind the finding to see whether it is without substantial support. If the rule were otherwise, it almost always would be within the power of a state court practically to prevent a review here."

At page 325, in the same case, this court say:

"In view of these decisions and the grounds upon which they proceed, it is clear that in a case like the present, where the issue is whether a state statute, in its application to facts which are set out in detail in the pleadings and are admitted by demurrer, violates the Federal Constitution, this court must analyze the facts as averred and draw its own inferences as to their ultimate effect, and is not bound by the conclusion of the state supreme court in this regard. The only respect in such a case in which this court is bound by the judgment of the state supreme court is in the construction which that court puts upon the statute."

The Court in that case, quoting from an earlier case says that the equal protection clause is designed to accomplish the result "that no impediment should be interposed to pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition."

In the case of *Western Union Telegraph Company v. Kansas*, 216 U. S. 1, the court reviewed upon error a judgment of the Supreme Court of Kansas. That court ousted the corporation from the state of Kansas for failure to comply with provisions of the state law for payments of prescribed percentages upon the authorized capital, the fee imposed purporting to be for the privilege of doing business within the state.

The court holds that the style of the tax as declared by the state court or by the legislature has no binding force on the court because this court say (l. c. 24):

"Neither the state court nor the legislature by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect."

The standard which this court will adopt in such cases, disregarding declarations of the state court in that behalf, is indicated by the opinion in the case last cited (l. c. 30) where this court say:

"Looking, then, to the natural and reasonable effect of the statute, disregarding mere forms of expression, it is clear that," etc.

In that case, the court say that the courts, when determining whether a statute is consistent with the fundamental law, must not deem themselves

"bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty — indeed, are under a solemn duty — to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority."

In *St. Louis Cotton Compress Co. v. State of Arkansas*, 260 U. S. 346, this court reviewed a judgment of the Supreme Court of Arkansas sustaining a recovery of 5% upon the gross premiums paid by the plaintiff in error for insurance upon its property in Arkansas to unauthorized insurance companies. Recovery was pursuant to the provisions of the statute in such cases.

The question arose entirely upon denial of the equal protection of the laws under the Fourteenth Amendment, and taking of property without due process under the same amendment. In that case, the court, as in the present case, "justified the imposition as an occupation tax." This court, in reviewing such characterization of it as an excise by the Supreme Court of Arkansas and refusing to follow it, say:

"The Supreme Court justified the imposition as an occupation tax—that is, we understand it, a tax upon the occupation of the defendant. But this court, although bound by the construction that the Supreme Court may put upon the statute, is not bound by the characterization of it, so far as that characterization may bear upon the question of its constitutional effect. *St. Louis S. W. R. Co. v. Arkansas*, 235 U. S. 350. The short question is, whether this so-called tax is saved because of the name given to it by the statute when it has been decided in *Allgeyer v. Louisiana*, 165 U. S. 578, that the imposition of a round sum, called a fine, for doing the same thing, called an offense, is invalid under the 14th Amendment."

In the same case, the court said:

"The name given by the state to the imposition is not conclusive."

Even if the statute declared the imposition to be an excise, or for privilege, this would not alter the conclusion because, as the court in the last case cited says: "the name given by the state to the imposition is not conclusive."

This court regards substance rather than form, and if the statute in the body of the enactment declared that it was a "privilege tax," this court would not be bound by such a declaration.

In the case of *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292, this court say:

"As in other cases of this character, we accept the decision of the state court of last resort respecting the proper construction of the statute, but are in duty bound to determine the questions raised under the Federal Constitution upon our own judgment of the actual operation and effect of the tax, irrespective of the form it bears or how it is characterized by the state courts. *Galveston H. & S. A. R. Co. v. Texas*, 210 U. S. 217, 227, 52 L. ed. 1031, 1037, 28 Sup. Ct. Rep. 638, *St. Louis Southwestern R. Co. v. Arkansas*, 235 U. S. 350, 362, 59 L. ed. 265, 271, 35 Sup. Ct. Rep. 99, *Kansas City, Ft. S. & M. R. Co. v. Bolkin*, 240 U. S. 227, 231, 60 L. ed. 617, 618, 36 Sup. Ct. Rep. 261."

Neither state courts nor legislatures can, by giving a tax a particular name, thereby validate what is inherently void.

In the case of *Choctaw O. & G. R. Co. v. Harrison*, 235 U. S. 292, although the state court held that the tax imposed by the statute there under consideration was one upon personalty, this court say:

"Neither state courts, nor legislatures, by giving a tax a particular name, or by the use of some form of words, can take away our duty to consider its real meaning and effect. We must regard the substance, rather than the form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the state. *St. Louis S. W. R. Co. v. Arkansas*, 235 U. S. 350."

The effect of the foregoing cases is to impose upon this court the duty of determining whether the tax as prescribed by the statute and levied by the State is a property tax or an excise tax, whether if it is an excise, it is a license fee or regulatory measure or one for revenue and having found its

character, method of application and degree in which it is discriminatory apply the measure of the Fourteenth Amendment to determine validity or invalidity.

Nor is this court bound by declarations that the equal protection guaranty is unavailable because of the fact that petitioner applied for admission to the state and therefore should be held impliedly to have waived the right to invoke the supreme fundamental law.

In the case of *Pullman Co. v. Kansas*, 216 U. S. 56, l. c. 63, this court say, in a case where was involved a supposed waiver by a corporation of its exemption of taxation on its interstate commerce by accepting and securing a license from the state for intrastate business:

“That the state could no more exact such a waiver than it could prescribe as a condition of the company’s right to do local business in Kansas that it agree to waive the constitutional guaranty of the equal protection of the laws, or the guaranty against being deprived of its property otherwise than by due process of law.”

The position of the defendant in error, substantially sustained by the Supreme Court of Illinois, is that the state having the right to exclude the plaintiff in error from entering the state in the first instance can impose taxes at will upon property of plaintiff acquired in the state while lawfully there, and burden the same by tax not imposed upon like property of domestic citizens. The distinction is ignored between the police power under which exclusion may be had, in the first instance, and invasion of the equality clause of the constitution by burdening its property by tax from which property of the domestic citizen is exempt.

The plaintiff being lawfully in the state, its property could not be subject to tax burdens greater than like property of others in the state was compelled to bear. We so understand the decision of this court—*Terral v. Burke Construc-*

tion Company, 257 U. S. 529, which, dealing with the Federal right of removal of cases, says:

"That state action whether legislative or executive, necessarily calculated to curtail the free exercise of the right, thus secured, is void because the sovereign power of a state in excluding foreign corporations as in exercise of all others of its sovereign powers, is subject to the limitations of the supreme fundamental law."

Frost v. R. R. Commission, 70 Law Ed. 682.

When the Supreme Court of Illinois (after license to the plaintiff in error had been granted in 1922) changed the construction of the statute previously declaring that the net receipts of plaintiff in error were to be taxed the same as other property and after issue of the license to plaintiff in error, declared that such law could properly be applied to tax its property at a much higher rate than property of others was taxed, then such construction and administration of the law and the statute as so interpreted operated to deprive plaintiff in error of the equal protection of the laws. The agreement of plaintiff in error, claimed impliedly to exist, to abide by the laws of Illinois has no just bearing nor any legal effect to prevent it from invoking the provisions of the Fourteenth Amendment as to any such law or actions repugnant to its guarantees.

II.

Upon the face of the statute the inherent characteristics of the tax imposed under Section 30 of the act of March 11, 1869, of the State of Illinois are those of a tax on property.

This statute, as originally enacted in 1853, (Act of February 12, 1853, Session Laws Ill. 1853, pp. 3-35 (l. c. 12-13). Appendix p. 81), was a part of an act entitled, "*An Act for the assessment of property and the collection of taxes in counties adopting the township organization law.*" This act provided that all property, real or personal, in the state, and all moneys or credits, should be subjected to taxation

and entered on the list of taxable properties in the manner provided in the act. It provided for taxation of physical personal property; and provided specifically that insurance companies "shall list for taxation, at its actual value, its real and personal property, money and credits within this state in the manner following." Then follows a recital of the nature of such real and personal properties, moneys and credits to be taxed, providing for a return to the assessor of the value of all "movable property" and "real estate"; and a provision that such companies shall be assessed in the town where their principal office is located; and providing that all such property shall be taxed at its listed value, if true. If the listed value was not the true value, then the assessor was required to value the property. After such provisions, the section concludes:

"Provided that every agency of an insurance company incorporated by the authority of any other state or government shall return to the assessor of the county in which the office or agency of such company may be kept, in the month of May, annually, the amount of the gross receipts of such agency, which shall be entered on the tax lists of the proper county and subject to the same rate of taxation for all purposes that other personal property is subject to at the place where located." (Appendix p. 84).

On March 11, 1869, a general insurance act was adopted by the legislature, and the foregoing section of the Revenue Act of 1853 incorporated substantially verbatim therein. (See sec. 30 brief p. 2, *ante*.)

A comparison of the language of the two will disclose that virtually all of the act of 1853 is retained; except that provision that the tax shall be upon "gross receipts" is changed to read "net receipts." An examination of the act of 1853 will disclose that it was not an act relating to insurance companies governing their right to do business in Illinois, but a revenue measure providing for the taxing of real and personal property. The section was bodily transferred to

the Insurance Act in 1869, which was entitled, "An act to incorporate and to govern fire, marine and inland navigation insurance companies doing business in the State of Illinois."

The legislative intent manifested in the enactment itself appears from the following pertinent matters in it:

(a) No duty is imposed upon any person to pay the tax, and liability for tax arises only from the direction of the statute that the amount of net receipts "shall be entered on the tax lists." It is an attribute of a tax upon property that it is not a liability imposed upon persons but a liability of the property enforceable against persons only because of their relation to the property.

(b) The tax is imposed only upon premiums "of any insurance company incorporated by the authority of any other state or government," upon the theory of taxation that the premiums derived by domestic companies remain in the jurisdiction in the form of cash (or property into which it is converted) which becomes the subject of taxation; whereas, foreign companies remove their property from the state and, therefore, the tax is imposed upon what they have derived in an elapsed year which, if they were domesticated, would be within the jurisdiction subject to taxation.

(c) The amount of such net premiums when so returned is not subject to any fixed imposition for privilege, to be exacted from either the insurance company or the agent; but the amount of the net receipts is to be "entered on the tax lists." Being so entered, it becomes subject to taxation, as the legislature explicitly provides, namely, "subject to the same rate of taxation for all purposes * * * that other personal property is subject to at the place where located." The resulting amount of the tax imposed on the net premiums is, therefore, automatically produced by entry on the tax list, whereby it becomes subjected to taxation at going tax rates applicable to property. As these tax rates are fixed to dis-

tribute the tax burden over all taxable property, the amount of the net receipts of the insurance company is part of the property to be considered by taxing authorities in fixing the general tax rate upon real estate and personal property over the entire state. A given amount of revenue being necessary for the support of the government, the taxing authorities must determine the amount of property to which proposed tax rates will apply in fixing the rate per cent of tax, and net premiums being entered upon the tax lists, they are a part of the mass of property considered in fixing the rate per cent to be applied. An increase in the amount of net receipts to be entered on tax lists, or elimination of all net receipts from tax lists, would produce two differing totals of property over which the tax exaction of the government would be distributed and, therefore, the rate per cent is necessarily increased or decreased by inclusion or exclusion of net receipts in the list of taxables.

Having considered the inherent characteristics of the tax as fixed by the language of the enactment, we shall in the next subdivision of this argument analyze the qualities of the tax as illuminated by its history.

III.

The history of the statute demonstrates that it was intended as a property tax and it has been so administered.

Reasonable stability of, and respect for the law require application of the rule declared by the Supreme Court of Illinois, in the case of *People, ex rel. v. Barnett*, 319 Ill. 403, as follows:

“The words of a statute must be taken in the sense in which they were understood at the time the statute was enacted.”

The original enactment of section 30 was in the Revenue Act of February 12, 1853 (Public Laws 1853, page 35, See

Appendix, p. 84). The subhead in such statute embracing sections 20-21 and 22 of that revenue act was, "of listing and valuing the property of banks, banking companies and other corporations." The statute as so enacted is here fully set forth and we call attention to the fact that the statute of 1869 in enacting section 30 reincorporated it almost verbatim, changing the text, however, from "gross receipts" to "net receipts." The act of 1853, with the provisions from which section 30 is taken, italicized, is as follows:

"The president, secretary, or principal accounting officer of every railroad company, turn pike or plank road company, insurance company, telegraph company, or other joint-stock company, except corporations whose taxation is specifically provided for by law, for whatever purpose they may have been created, whether incorporated by any law of this state or not, shall list for taxation, at its actual value, its real and personal property, moneys and credits, within the state in the manner following:

"In all cases return shall be made to the assessor of each of the respective counties where such property may be situated, together with a statement of the amount of said property which is situated in each county, town, city or ward therein.

"The value of all moveable property shall be added to the stationary and fixed property and real estate, and apportioned to such wards, towns, cities, and counties, pro rata, in proportion to the value of the real estate and fixed property in said ward, town, city or county. The capital stock of bridge companies shall be assessed in the town where their principal office is located.

"If the county assessor to whom returns are made is of opinion that false or incorrect valuations have been made, or that the property of the corporation or association has not been listed at its full value, or that it has not been listed in the location where it properly belongs, or in cases where no return has been made to the county assessor, he is hereby required to proceed to have the same valued and assessed in the same manner as is prescribed in the several sections of this act regulating the duties of the county assessors in cases of refusal or neglect to list property: *Provided, that every agent of an insur-*

ance company, incorporated by the authority of any other state or government, shall return to the assessor of the county in which the office or agency of such company may be kept, in the month of May, annually, the amount of the gross receipts of such agency, which shall be entered on the tax list of the proper county, and subject to the same rate of taxation for all purposes that other personal property is subject to at the place where located."

It will be noted that what was to be listed by insurance companies was "property, moneys and credits within the state in the manner following."

In the act governing fire, marine and inland navigation insurance companies, the act of March 11, 1869, (Public Laws 1869, p. 209), the latter provision of section 22 of the assessment act of 1853 was incorporated as section 30 in the insurance code. There was added a proviso—

*"provided that the provisions of this section shall not be construed to prohibit cities having an organized fire department, from levying a tax or license fee. * * * on gross receipts."*

The Supreme Court of Illinois, in 1880 in the case of *Walker v. City of Springfield*, 94 Ill. 364, in an action to recover a penalty fixed by ordinance as a license fee, which it was there said was unlawful as in conflict with section 30, there said of section 30:

*"When we consider that the previous portion of the section (that which precedes the proviso) was for taxation, and the proviso for the purpose of fixing a maximum fee for a license, it is apparent that the two provisions have no necessary connection. They relate to different and dissimilar purposes. * * * This proviso seems to have been intended to limit and restrain more extensive powers granted by special charter to various cities in the state. It has no reference to taxation."*

The Supreme Court of Illinois, in 1888 after re-enactment of section 30 in the Code of 1879 (wherein the act of 1869

was reenacted verbatim), held that net receipts should be taxed at the same rate and in the same manner as other property.

In *City of Chicago v. Phoenix Insurance Company*, 126 Ill. 276, the court said of this section:

“The legislature intended to establish a plan general in character under which the net receipts of foreign insurance companies might be taxed in the same manner and at the same rate of taxation as other personal property in the state, and that the taxation so imposed should be in lieu of all town and municipal licenses. The language employed is so plain and intent so manifest that any attempt to elaborate the subject is uncalled for.”

The taxes imposed by section 30 have been uniformly construed for fifty-four years as property taxes. Returns were uniformly made to assessing officers having in charge the assessment of property. The valuation of net receipts for taxation purposes in all of the 102 counties of Illinois was uniformly debased, equalized, and assessed by assessing officers and the rate per cent of tax levy was extended against the valuation so found, and taxes certified to regular tax collectors and collected by them the same as those upon other personal property.

The Supreme Court of Illinois, again in 1910 confirmed this practice in *People v. Cosmopolitan Fire Insurance Company*, 246 Ill. 42, where the sole question involved was whether administratively a tax could be imposed on net receipts of a foreign insurance company under provisions of the revenue law relating to taxation of “all other property not enumerated.” The action was brought under the Revenue Acts of Illinois for taxing personal property and an assessment was shown against the defendant under the item—“all other property not enumerated.” The insurance company made the defense and proved it had no personal property (unless net receipts were property) in the jurisdiction in the years the tax was imposed. The court say in discussing this claim:

“The company had a right to show it did not own the property assessed against it (*Weber v. Baird*, 208 Ill. 209), and it insisted the testimony of the agent that the company had no personal property in Cook County in 1907 or 1908 proved the assessment void. That position is not correct, for the reason that the company was liable to taxation on the net receipts of its business in Chicago. The view of counsel that the tax on net receipts is a license to do business in this state, and not a tax is erroneous. The net receipts are personal property and are to be listed by the Board of Assessors and Board of Review and taxed the same as other property.”

Pursuant to common practice and uniform construction by tax officials and courts from 1869 to the time of this assessment, tax rates were applied to a reduced or debased “assessed value.” The Board of Assessors proceeded likewise in the case of the tax here under review. The Board of Review of Cook County, contrary to such uniform practice of fifty-four years standing, refused to confirm the assessment upon the basis upon which other property was taxed but raised the “assessed value” to the full cash value figure thereby taxing plaintiff in error \$7,184.18, whereas other property of identical value held by other taxpayers was uniformly and intentionally taxed at only \$2,155.24.

The Supreme Court of Illinois has defined and declared the proper application of this statute in various decisions respecting its scope and proper application. A review of these cases, to be understandingly made, requires a brief review of other statutes and other sections of the Act of which Section 30 is a part, so that the court may have them in mind in considering the effect of declarations of the Supreme Court of Illinois respecting section 30 of the act of March 11, 1869.

Statutes of Illinois incidentally affecting determination of the issue herein.

Act of March 11, 1869:

Section 22. Conditions of the right of a foreign insurance company to enter and do business in the state of Illinois are provided by section 22 of the act of March 11, 1869, and cover appointment of an attorney for service, filing of copy of charter, statement of assets, copy of annual report of the company filed with other states, deposit of moneys with the state of Illinois, securing of a certificate of authority to do business, making of an annual statement (as prescribed annually) of underwriting and investment experience of the company as a whole; and a renewal of certificate in July of each year is provided for if statement as to underwriting and investment experience discloses solvency. (See section 22, appendix p. 84.)

Stringent penalties are provided for failure to comply with provisions of the act as to securing and renewal of license, but there is no provision for the payment of taxes as such condition.

Section 22½-23. False statements as to the solvency of underwriting experience of any company are made ground for revocation of license. (See section 22½, appendix p. 88-89.)

Examination of the company's books and records, to ascertain solvency and correctness of its statements of its underwriting and financial experience upon its whole business, are provided for, and revocation of license in case it is found unsound. (Sec. 23, appendix p. 89.)

Section 27. This section provides for fees for various matters, such as filing charter, annual statement, certificate of authority to agents, and a charge of 20c per folio for every paper filed in the office of the auditor. (Appendix p. 92.)

Act of 1898:

The imposition of taxes for revenue in Illinois has been uniformly, since enactment of 1898, that property

should be valued at its fair cash value, to be set in one column, and that in another column should be placed its assessed value, and that a percentage, now one-half of the value of such property should be set down as an assessed value, which should be considered as the value of the property for purposes of taxation. (See appendix p. 97.)

Privilege Act of 1919:

On June 28, 1919, a privilege tax law was enacted, which is applicable to the plaintiff in error as well as all other insurance companies foreign to Illinois (including casualty companies) seeking license therein, providing for a privilege tax of two per cent on the gross premiums received during the previous calendar year on contracts covering risks within the state. This is a privilege tax statute, pure and simple, with the provisions of which plaintiff in error has complied and under which it pays two per cent of its gross premiums for the privilege of doing business in Illinois. (See appendix, p. 99.)

Act of 1879.

The licensing conditions imposed on fire insurance companies by Act of March 11, 1869 were supplemented in 1879 by requirement that application should be made for license in the state, such license to terminate upon removal of a case to the federal courts. (Appendix, p. 93.)

Act of 1893.

The only provision in the Illinois statutes even indirectly making section 30 a condition of doing business in the state is the act of June 22, 1893, providing that the act of any company placing business upon Illinois property except through legally authorized Illinois agents is declared by law to be a violation of the law providing for payment of taxes by foreign insurance companies as provided in section 30. Violation by placing the business through unauthorized agents shall result in revocation of license. (See act of June 22, 1893, appendix p. 95.)

The foregoing are the only statutes in anyway affecting the right of plaintiff in error to do business in the state of Illinois, or its obligations to pay taxes according to the tenor of section 30.

Illinois decisions construing Section 30.

The decisions in Illinois, rendered by the Supreme court of that state, respecting section 30 and its construction and effect, are as follows:

In *Walker v. City of Springfield*, 94 Ill. 364, (1880) the Supreme Court of Illinois had for consideration the proviso attached to section 30 reading:

“Provided, that the provisions of this section shall not be construed to prohibit cities having an organized fire department from levying a tax or license fee, not exceeding two per cent, * * * on the gross receipts of such agency, to be applied exclusively to the support of the fire department of such city.”

The court in considering this portion of section 30 held that it is independent of the taxing provisions here for consideration, and says, that the word “provided” separates the section into two parts—the first part relating to a *tax*, and the latter portion to a *license fee*. In this respect the court say:

“It is urged that the 30th section of Chapter 73, Rev. Stat. 1873, controls this power of charging a license fee to foreign insurance companies; that it is repugnant to and repeals the provisions of the charter authorizing a tax or fee for a license. It provides that their net income shall be returned to the assessor for general taxation, and at the same rate as other property, and to be in lieu of all town and municipal licenses; and it repeals all laws inconsistent therewith. But it contains this proviso:” (Setting forth the proviso.) (p. 369.)

In contrasting the first portion of the section with the proviso respecting fire department tax, the court say:

“When we consider that the previous portion of the section was for the purpose of taxation, and the proviso for the purpose of fixing a maximum fee for a license, it is apparent that the two provisions have no necessary connection.”

The declaration of the court (A. D. 1880) that the exaction here in question was a tax exaction and not a license or excise has been uniformly adhered to since that time, except as it is departed from in the case at bar.

In the case of *City of Chicago v. James*, 114 Ill. 479, (A. D. 1886), the court in contrasting section 30 of the act of 1869, as re-enacted in 1879, with earlier impositions on insurance companies, says that such earlier exactions and the ones imposed by section 30 “are radically inconsistent with each other.”

The court, in contrasting the exactions of section 30, re-enacted in 1879, with provisions of section 110 of another act (not here before the court), said:

“But under the act of 1879 the amount of the receipts was to be entered upon the tax lists, and the rate of taxation is to be the same as other personal property for all purposes. * * * The two per cent fixed by section 110 was in reality a license fee. * * * Section 30 of chapter 73, by requiring the amount of these receipts to be listed, and subjecting them to taxation the same as other property, made the amount to be derived therefrom a tax.”

Not only is the tax upon net receipts to be the same, but the manner of taxation is identical as taxation on physical personal property. The Supreme Court of Illinois so held in the case of *City of Chicago v. Phoenix Insurance Company*, 126 Ill. 276, (A. D. 1889) where the court said:

“It will be observed by an examination of that part of the section of the statute which precedes the proviso, that the legislature intended to establish a plan, general in character, under which the net receipts of foreign insurance companies might be taxed in the same manner and at the same rate of taxation as other personal property in the state, and that the taxation so imposed should

be in lieu of all town and municipal licenses. The language employed is so plain and the intent so manifest, that any attempt to elaborate the subject is uncalled for."

In *National Fire Insurance Company v. Hanberg*, 215 Ill. 378, (A. D. 1905) the proceeding was by bill in chancery to enjoin tax imposed under section 30. The tax was there assessed upon net receipts and the court there confirmed a tax wherein the assessment was "\$88,000. full value and \$17,600. assessed value." (P. 380.)

The court held that the tax was not to be imposed on the full amount of net receipts but upon the assessed value, which was then by statute one-fifth of actual value and said:

"That the legislature intended all foreign insurance companies doing business in this State should be assessed * * * upon the amount remaining after deducting from their total receipts their operating expenses." (P. 381.)

In *People v. Cosmopolitan Ins. Co.*, 246 Ill. 442, (A. D. 1910) action was brought upon the assessment roll of the tax assessors, upon which appeared an assessed sum enumerated under the caption, "All other property not enumerated." The court held that this was a proper method of assessment of the tax and that suit on the assessment roll could be maintained; that the fact the defendant had no tangible property would not defeat a recovery of this tax entered on the tax roll as property, because the liability for net receipts was properly placed under the caption of "All other property not enumerated."

In this connection, the court said:

"The view of counsel that the tax on net receipts is a license to do business in this state, and not a tax, is erroneous. The net receipts are personal property and are to be listed by the board of assessors and board of review and taxed the same as other property." (P. 448.)

The proof on the part of the people in that case consisted of the assessment rolls under a listing of "All other property not enumerated." (P. 447.) A full value was entered in the full value column and a smaller amount in the assessed value column. (P. 447.)

The evidence on the part of the insurance company was that it had no personal property in the taxing jurisdiction. The court said: (P. 448)

"The company had a right to show that it did not own the property assessed against it, (*Weber v. Baird*, 208 Ill. 209,) and it is insisted that the testimony of the agent that the company had no personal property in Cook County in 1907 or 1908 proved the assessment void. That position is not correct, for the reason that the company was liable to taxation on the net receipts of its business in Chicago.

"The view of counsel that the tax on net receipts is a license to do business in this state, and not a tax, is erroneous. The net receipts are personal property and are to be listed by the board of assessors and board of review and taxed the same as other property." (P. 448.)

In the same case it was urged that the assessment was erroneous because there was no assessment of property but only an assessment against the company. The court holds that the assessment cannot "charge a total value of property against an individual without *assessing the property*."

The court, however, holds that property was assessed and says:

"While an assessor or board of review is bound to set down in the proper column the assessed value of property and must assess property and not persons, there was no failure to comply with the law in that regard." (P. 449.)

This conclusion the court reaches because the property was assessed as "other property not enumerated."

In the case of *The Fidelity and Casualty Company v. Board of Review*, 264 Ill. 11, (A. D. 1914) the Supreme Court of Illinois held that net receipts of a casualty company from whatever insurance derived are not taxable under section 30.

The case arose upon a tax assessed against a casualty company upon its net receipts, and the court holds that "the act of 1869 does not purport to apply to any insurance corporations except such as are engaged in fire, marine and inland navigation insurance." (P. 15.)

The court holds that the licensing act of 1879 (appendix p. 93) was sufficiently broad to extend all the conditions precedent of the Act of which section 30 is a part to all insurance companies, including both fire and casualty companies, but that payment of the tax under section 30 is not a condition of doing business, and said:

"The payment of a tax on net receipts was not and could not be a condition precedent to the right to do business, and we do not think it a reasonable construction to hold that because fire, marine and inland navigation insurance companies were required by the act of 1869 to pay taxes on their net receipts, the mere extension of the requirements of that act as conditions precedent to the right to do business in this state subjected the net receipts of other insurance companies, such as appellant, to taxation." (P. 17.)

In other words, the payment of the tax is not a condition of doing business in the state, and in the nature of things cannot be a condition precedent.

In *People ex rel. v. Kent*, 300 Ill. 324, (A. D. 1921) a mandamus against an agent of a mutual fire insurance company was sustained, the action being to compel the making of a return under section 30 of the act of 1869.

The court there say, respecting the exactions of section 30:

"No provision is made for the assessment of such net receipts at less than their actual amount or their equaliza-

tion with other property. On the contrary, it is directed that the amount of such net receipts shall be entered on the tax lists and subject to the same rate of taxation as other personal property. The tax is not levied on the property of the corporation by valuation but on the net receipts of its business." (P. 327.)

Further declaring the nature of the tax, the court say:

"Net receipts are, of course, personal property and a tax on net receipts a personal tax." (P. 328.)

In *People ex rel. v. Barrett*, 309 Ill. 53, (A. D. 1922) which was a suit in mandamus on the relation of the City of Chicago against the Board of Review to compel imposition of taxes under section 30, the court held that the license act of 1879, (Appendix p. 93) providing the conditions for insurance companies to do business in the state, has no relation to section 30.

"It is clear, however, that the License Act does not extend, or purport to extend, the operation of section 30 of the Act of 1869." (P. 59.)

The court reaffirm the decision in *Fidelity and Casualty Company v. Board of Review*, 264 Ill. 11, that payment of tax on net receipts was not and could not be a condition precedent to the right to do business. (P. 60.) Casualty companies and domestic fire insurance are held to be exempt from the burdens of section 30. The court say (p. 67):

"Our conclusion is that insurance companies other than fire, marine and inland navigation are not taxable under section 30."

The court holds that the net receipts of fire insurance companies are not subject to deduction for purpose of equalization, as is done respecting other property, and that the scaling of full value as to other property is not to be applied to net premium receipts. The court characterizes this as:

"A tax on the business of insurance, as shown by the net receipts, and not a personal property tax. This be-

ing so, there was no authority for a reduction or scaling of the amount to be taxed under section 30." (P. 63.)

The court holds that fire, marine and inland navigation companies are taxable and that other insurance companies are not taxable upon identical net receipts (P. 67); that net receipts "should be entered without reduction on the tax books." (P. 67.) The characterization of the tax is that "the tax imposed by section 30 is a business tax based upon net receipts."

In the case at bar—*Hanover Fire Ins. Co. v. Carr*, 317 Ill. 366—which was a suit to enjoin the collection of taxes under section 30, the court holds that as the state has the right to exclude a foreign corporation altogether, it may, after the corporation has entered the state, impose any tax upon it which the state sees fit; and say:

"Having a right to prohibit a foreign corporation from entering the state to do business, it follows that the legislature may exact such compensation for that privilege as it sees fit and levy the same in any manner or by any method it chooses." (P. 372.)

The court recognize that the tax is not made a condition of doing business in the state, and say:

"Such a condition, being precedent, could, of course, be met but once. However, the greatest financial benefit to such a company flows from the continuation of the privilege to do business. Compensation for that privilege should be based on the benefits actually derived from the business done under such privilege, and such compensation must necessarily be assessed in some manner after the business is done and the benefits thereof received." (P. 373.)

The court refers to the act (Appendix p. 95) providing that any company placing business in Illinois through any other than regularly authorized agents shall be deemed to have violated section 30 and shall have its license revoked, and say:

"It seems clear, therefore, that this tax is levied as compensation for the privilege of continuing their business in the state." (P. 375.)

(It is to be noted that the court does not say that payment of the tax is a condition of the grant or renewal of license to a foreign fire insurance company.)

The court recognizes that it is in fact a property tax by stating that section 30 requires the tax to be assessed at the places where the business is transacted, and says:

"A valid reason is seen for this distribution of the tax. The foreign fire insurance company takes its net proceeds largely from the vicinity of its agencies, and it is but just that it return to the municipality in which its agency is located something in lieu of the taxes that would otherwise be realized from such net receipts as are taken away." (P. 375-376.)

It is our position that this declaration, that it is in effect a commuted property tax in lieu of a tax on the physical premiums which would be present for taxation if not removed from the state, makes it in essence a tax upon property, and that intentionally taxing its value in a larger sum than that levied against identical property acquired by domestic fire insurance companies operates both as a deprivation of property without due process of law and a denial of the equal protection of the laws.

The court discusses the application of the Fourteenth Amendment (at pages 377-8 of the opinion) but holds that the plaintiff in error is not entitled to the protection of this constitutional guaranty. At page 378, the dissenting opinion holds that the imposition of this tax violates the guaranties of the Fourteenth Amendment, and that the principal opinion fails to distinguish between a fee for the privilege to transact a business within the limits of a state and a tax imposed upon receipts from business lawfully done. The one places burdens upon a grant of privilege as a condition

and the other is a tax upon the actual engagement in it. The opinion further notes the point that:

"It is just as clear that there is a distinction between a tax on a particular business and a tax on the person exercising the privilege of engaging in that business. The payment of the latter is a condition precedent to the right to engage in the business, while the former is merely a charge on the business for the purpose of raising revenue for the maintenance of government." (P. 383.)

The court further say:

"This distinction between a business tax and a privilege tax was recognized and applied in *Nebraska Telephone Co. v. City of Lincoln*, 82 Neb. 59, 117 N. W. 284." (P. 384.)

The dissenting opinion concludes:

"An occupation tax on the business of insurance, to be valid, must operate alike ~~upon~~ all persons or corporations engaged in the same class of insurance business. Section 30, operating upon insurance companies incorporated by the authority of other states or governments and licensed to do business in this State and not upon insurance companies incorporated under the laws of this State and other companies and persons doing identically the same class of insurance business, contravenes the Federal and State constitutions and is void." (P. 386.)

The foregoing extracts summarize all the decisions of the state of Illinois bearing upon section 30, its nature, meaning and effect, and its method of application.

In the next subdivision of this brief, we shall treat of the general nature of a tax of the character as so fixed by the statute and the decisions of Illinois construing it.

VI.

The true character of the impositions of Section 30 is that of a tax on property.

The characteristics of the tax here under consideration are those which inhere in a taxation of property and not those applicable to excise impositions.

The legislative intent that net receipts were to be considered and taxed as personal property may be deduced from the following considerations:

An analysis of section 30 discloses that its essential provisions are:

(a) Every agent of a foreign insurance company shall annually "return" the amount of the "net receipts" of his agency.

(b) The return must be made "to the proper officer" of the taxing district in which the agency is established.

(c) The amount of the "net receipts of such agency" for the preceding year "shall be entered on the tax lists" of the proper taxing district.

(d) The net receipts (not the insurance company) are "subject" to taxation for state, county, town and municipal purposes.

(e) The taxation of net receipts must be at "the same rate of taxation for all purposes * * * that *other personal property* is subject to."

(f) As tax rates differ in different districts, the rate to which net receipts are subject to tax is the rate at which other personal property is subject to "at the place where located."

Considering this Statute solely from its context, without regard to decisions under similar statutes and without regard to its interpretation by the State of Illinois, the following observations seem irrefutable:

The agent of a foreign insurance company is an officer licensed and given powers by the State by section 22 of the Act of 1869 (see Appendix p. 87). Such person having delegated power from the State is required to make a return. The agency is contemplated to be one which is "established" in a given jurisdiction. Upon such agency is imposed the duty annually to make a return of the amount of net receipts of the agency for the *preceding* year. The obligation for the tax does not arise merely upon the filing of a report, but upon so being filed, the amount "shall be entered on the tax lists." This is an act not done by a company or the agent, but by state officers whose office is to secure revenue for the state and its municipalities. There is no provision that anyone shall pay any tax or sum, neither the agent nor the insurance company, but the amount of the net receipts having been entered on the tax lists, by such entry of the tax officer, becomes "subject" to taxes. Such sum is not one uniform throughout the state or even the county, (in the present case the tax was imposed in a town within the city of Chicago, within the County of Cook). The entry on the tax list makes the amount so entered or the *net receipts* "*subject to the same rate of taxation*" for all purposes as "other personal property." By use of the term "other," net receipts are classified as themselves personal property, and personal property is subdivided into two groups, namely, "net receipts" and "other personal property." They are not subject to different taxes, but the same rate of taxation. This tax is not imposed on insurance companies nor upon insurance agencies, but upon the net receipts. To fix the tax rate to which it is subject so that it may not at one time be taxed in one jurisdiction and at another time in another,

and then perhaps at different rates, it is subject to tax the same as "other personal property is subject to at the place where located."

The word "located" refers to the location of net receipts derived by an "established" agency. The establishment of the agency fixes the situs of the thing to be taxed and the net receipts which the agent may retain in specie, or, at his own risk, remit elsewhere, are treated as present at the established agency point where they are derived and received. The agent may retain them so they may be subject to the tax directly, or if he transmit them without retaining enough to which the tax lien may attach, he may become subjected to the penalties of the statute for violation of his self-assumed official duties.

The use of the word "located" does not purport to relate to any person or entity, but refers to the *locus* of premiums which have been received by an established agency, the location of which establishes the *locus* of the fund whether in fact remaining or only theoretically undistributed.

The language of the statute that net receipts shall be subject to the same rate of taxation as "other personal property" is a clear recognition of net premium receipts as personal property.

The subjection of the fund to the processes to which other personal property is "subject" requires certification to the county treasurer and collector of taxes and the record discloses that this was done in the case at bar. The statute does not impose any duty upon any person or entity to pay but by making the net receipts "subject" to regular tax processes, collection may be enforced in the same manner as other taxes and the tax collected from specified persons purely because of their relation to the taxed property. There is no provision in this law, express or inferential, placing an obligation of payment upon any one. A license to follow a specified vocation invariably is issued to a specified person who must pay the

license exaction as a condition of permitting that person to enter upon or continue such occupation. It is personal to him and he may not assign it or share it with others, for it gives to him a personal attribute denied to others. This tax is lacking in these essentials. An insurance agency representing three or four foreign companies would be bound to report all the premium receipts derived for all of them. There is no provision in the law that he shall separately return for various companies in his agency. If, as contended by the taxing authorities, the tax here in question is subject to collection and distribution under the revenue statutes and machinery provided by law, it differs from excise exactions which invariably are imposed directly by the general assembly as a fixed proportion or percentage of income, if a percentage plan be applied, or a flat amount as the case may be, without intervention of tax assessing officers and without application of tax rates applicable to property. When net receipts are entered upon the tax roll, they become part of the whole mass of property subject to taxation in the given territory. When the needs of the state and its departments have been determined, there is determinable a ratio which such ascertained governmental requirements bear to the property values to which the rate is to be applied. The tax rate is, in fact, a statement percentagewise of the ratio of the state's requirements for support related to the taxable values from which such sum is to be derived. Of necessity, if the value of the net receipts is entered upon the tax list as a portion of the values to which tax rates are to be applied, the sum total of valuations on such tax records is taken into account in fixing the tax rate. If net premiums were omitted from the tax rolls, there would of necessity be an increased tax rate on all property to produce the same sum of money as is derived from the total upon the tax rolls inclusive of net receipts. The presence of net receipts upon the tax rolls, therefore, is an inherent part of the determination of the tax rate and affects the taxes to be paid for the general support of the

government by the other property upon the tax roll; namely, other personal property and real estate. The tax on net receipts is not a sum derived like an excise which, if collected or not collected, leaves the general revenue and taxes imposed upon property unaffected, but it is an inextricably interwoven part of the body of tax exactions upon property. The Supreme Court of Illinois, recognizing this in considering a tax under section 30 which was before it for review in the case of the *People v. Cosmopolitan Fire Insurance Company*, 246 Ill. 422, said of the exactions under this section:

"The view of counsel that the tax on net receipts is a license to do business in this state and not a tax is erroneous. The net receipts are personal property and are to be listed by the Board of Assessors and Board of Review and taxed the same as other personal property."

Under similar statutes in other jurisdictions, the courts have likewise declared like exactions to be taxes upon property.

In the case of *Thompson v. McLeod*, 112 Miss. 383, s. e. 73 So. Rep. 193, the Supreme Court of Mississippi had for review a bill of injunction to restrain the levying and assessing of taxes.

The tax in question was described in the title to act to be:

"An Act to Levy and Collect and Enforce the Payment of an Annual Privilege Tax or Occupation Fee upon all persons * * * Corporations, Pursuing the Business of Extracting Turpentine from Standing Trees."

The question in the case was whether the tax was a property tax or a privilege tax. The bill alleged that defendant paid another fee for privilege purposes entirely distinct from that there involved. The amount of the tax in the case before the court was one-fourth ($\frac{1}{4}$) of 1 cent each year for each cup or box.

Sworn statements were required to be rendered annually of the total extraction of turpentine. Penalties and distraint were imposed for failure to pay the tax.

The court say, per Stevens, J.:

"It is conceded by counsel for the state that, if the tax here attempted to be imposed is a property tax, the act imposing it is unconstitutional and void. In following the rule, so frequently announced by the courts, of looking through the form to the substance, it is manifest that the tax exacted by the act under review operates, and can only operate, as a property tax, and is really not a privilege tax. We are not called upon to place any limitation upon the right of the state to exact licenses or impose privilege taxes that are really such, and to require the taxes as a condition precedent to the right to do business within the confines of our commonwealth. We do not question the right of the state, also, to measure a privilege tax by the volume or amount of business done. The act here assailed does not even attempt to require a license or permit to be issued by any officer or department of the government as a condition precedent to the right of a citizen to extract crude turpentine from pine trees. No document of any kind is to be issued in advance. The tax demanded by the act is to be paid at the end of the year and after the resin is extracted,—after the so-called privilege has been exercised. On default by the taxpayer, payment of the tax is enforced by seizure and sale of any property belonging to the defaulter. The enforcement of the tax conforms to the procedure adopted for the enforcement of *ad valorem* taxes."

The court, quoting from the case of *Thompson v. Kreutzer* in the same court, 112 Miss. 165, say:

" 'A tax on an essential attribute of a thing is a tax on the thing itself,' " and " 'no tax can be imposed on the right of ownership which is not also a tax on property.' "

(Quoting from opinion of Chief Justice Marshall in the case of *Brown v. Maryland*, 12 Wheat. 444.)

In the case of *Phoenix Fire Insurance Company v. City of Omaha*, 23 Neb. 312, the court had for consideration a statute of Nebraska providing for a tax upon the gross premiums of every insurance company to be assessed and paid in the

county where the agent conducted the business. The case turned upon the question whether or not such premiums were "taxable property." The court say:

"The legislature has thus declared the premiums received by insurance companies doing business in this state * * * to be subject to taxation in the hands of the agent. It is the law and policy of the state to make yearly assessments and collection of taxes. The amount of premiums received by any insurance company for any one year can only be known after the expiration of such year; accordingly, for the purpose of such taxation, the law adopts the year terminating at the date of the annual assessment of property for general taxation, and charges the agent with the duty of making a true list of such premiums for such year, and of returning it properly verified to the assessor; and of retaining in his possession at his peril a sufficient amount of such premiums to pay the taxes on the value of the premiums so listed and returned by him. * * * it will also be assumed that a foreign company coming to this state to do business, does so in view of the public law of the state, and that all of its transactions with its agents and others will be made with regard to such laws."

Later in the opinion, the court say:

"On the contrary, as we have seen, our statute provides for the taxation of the gross amount of such premiums in the county where they are received the same as taxable property, for placing the amount thereof upon the assessment roll along with taxable property, and that the agent who conducts the business is declared personally liable for the tax. The charter of the city of Omaha also provided for the taxation of all real and personal property within the corporate limits of the city, taxable by the laws of the state, and that the valuation of such property be taken from the assessment roll of the proper county. It must be held, as suggested by the court in the case of *Lott v. Rose*, 38 Ala. 156, that the words 'taxable property,' or 'property taxable according to the laws of this state,' are used in the law governing cities of the first class in our statute, in the sense of taxables or subjects of taxation, will embrace everything liable to taxation."

In the case of *New York Life Insurance Co. v. Bradley*, 83 S. C. 418, s. c. 65 S. E. Rep. 433, the Supreme Court of South Carolina had for consideration an imposition which by statute was imposed on foreign insurance companies who were required to report the amount of their gross premium receipts to the local tax body. These receipts were by statute required to be entered on the tax books and the rate of taxation applicable to other taxable property applied thereto. The insurance company paid tax under protest and brought suit to recover the amount paid. One of the principal questions presented was whether the exaction was a privilege tax or a tax upon property. The court held that if the exaction were determined to be "the price or condition of allowing the plaintiff as a foreign corporation to do business in the state, then all the constitutional objections urged against it would be unavailing." The court states that if on the other hand it is imposed "as an ordinary property tax," it will be necessary to consider the objection urged, that as a property tax, it is forbidden by the constitution of the State and of the United States. The court set forth the provision of the act known as Section 302 of the Civil Code, which is recited in the opinion as follows:

"Each agent in this state of any insurance company organized under the laws of any other state or country, and doing business in this state, shall, annually, in the month of January, or before twentieth of February, return to the auditor of the county in which such agency is located, a sworn statement of the gross receipts of such agency for the year ending on the first day of that month, including all notes, accounts and other things received or agreed upon as a compensation for insurance at such agency, together with all the value of any personal property of said company situated at such agency; and the company shall be charged with taxes at the place of said agency on the amounts so returned; and the agent shall also be personally responsible for such taxes, and may retain in his hands a sufficient amount of the company's assets to pay the same, unless the same shall be paid by the company."

After quoting section 302, the court say:

"If nothing else appeared, it seems too obvious for discussion that the tax provided by this section was intended, not as a privilege tax, but as a tax on the property of foreign insurance companies; the gross income collected in the state being deemed by the general assembly property within the state."

In the same civil code, sections 1808 and 1809 appear. Section 1808 provides for a license fee for insurance corporations. Section 1809 requires each of the companies mentioned in section 1808 to make a return to the comptroller general. The section then continues:

"The comptroller general shall, immediately after the close of each year, transmit to the county auditor in each of the various counties from which such company has derived its gross premiums or gross receipts, a statement of the amount of premiums or receipts collected in such county during the preceding year, which said statement of the gross receipts heretofore required of the agency of such company in such county shall be placed on the duplicate in such county, together with other items now included in the taxable property of such company."

The court hold that the portion last quoted from section 1809 repeals in part section 302. But the court say:

"But the substituted enactment contained in section 1809, not less than section 302, provides for a property tax on gross receipts of the insurance company. No other conclusion is possible except by distortion of the language of the statute. The sum of such receipts reported by the comptroller general is to be placed on the tax duplicate, 'together with other items now included in the taxable property of such company.' This clearly means that the sum of the gross premiums is to be treated and entered as an item of property for the purposes of taxation, along with other items of property, such as office buildings, furniture and land. Thus the tax is in fact designated in the statute as a property tax."

The court then take up the plan of legislation relative to insurance companies and point out that other statutes provide for the payment of a privilege tax. On this branch of the case, the court say:

"Distinct from this as a property tax, two privilege or license taxes are in the same act provided for, and called license fees, namely, \$100, and an additional and graduated license fee of an amount equal to one-half of one percent on the gross premiums, gross income, or gross receipts. What is still more convincing is that the plan of the legislation is to make any failure to pay a privilege tax result in the forfeiture of the right to do business in the state; and accordingly it is provided that the failure to make returns of gross income to the comptroller general, or the making of a false return, or the failure to pay the sum designated as license fees, shall result in forfeiture of the right to do business in the state. The omission of such a penalty for non-payment of the tax to the county treasurer is so conspicuous as to indicate a careful design to place the exactions named as license fees in an entirely different class. If that had been intended as one of three exactions, for the privilege of doing business in the state, the general assembly would not have made the failure to meet either of them result in forfeiture, and carefully avoided providing that result for failure to comply with the third. No doubt the conditions upon which a foreign corporation may enter a state may be implied from the terms of the statute; but here, as we have endeavored to show, the language of the statute is too plain for implication. It is also significant that section 1809 not only indicates in positive language that the sum of the gross premiums shall be placed on the tax duplicate as property, but it provides no penalty for the failure to pay the tax levied thereon. Obvious reason is that it was intended the tax should be collected as a property tax, and payment enforced by the remedies already provided by a different statute for that purpose."

The court in that case held the statute unconstitutional.

In the case of *Parker v. North British & Mercantile Ins. Co.*, 42 La. Ann. 428; 7 So. Rep. 599, the court had for consideration a tax upon gross premiums. The court say: (P. 431)

"We are not prepared or required to say whether such a tax, if imposed in proper terms as a license tax, would be valid.

"It is not, and does not purport to be, a license tax. A license tax is not covered or contemplated by either the title or body of the act.

"The very proceeding taken by the state is one provided exclusively for the collection of property taxes, and under the terms of the pleadings, as well as under the assessment itself, it is claimed and denominated as a tax on property."

The court further say:

"If 'gross receipts' be properly subject to taxation, the 'gross receipts' of all, or of none, must be taxed."

In concluding its opinion, the court say:

"As we have heretofore intimated, if this act merely imposed on the foreign insurance company the duty of paying to the state a certain percentage of its premiums received, as a condition of a permissive license to transact business in this State, different questions would be presented. That would not be a tax, and would not involve the exercise of the taxing power.

"But the imposition here is levied as a tax, assessed as a tax, claimed as a tax by the tax collector, under proceedings provided exclusively for the collection of taxes. It is a distinct exercise of the taxing power, and must be governed by all constitutional requirements and limitations applicable thereto."

Under the decision of the courts of Illinois in the case at bar the tax may be imposed upon the net receipts of foreign insurance companies chartered to do a business of fire insurance, whereas companies incorporated in Illinois under a like charter are exempt from such tax. The plaintiff in error is held subject to the tax, whereas other foreign insurers, in direct competition and doing identical business (because they are styled by their charters "Casualty Companies,") are exempted. The difference in the mere name is

made the point of distinction. The business upon which plaintiff in error is so taxed and other foreign insurance companies are exempt is that of insurance of automobiles against hazards of theft, collision, fire, explosion and transportation; insurance of property against damage by explosion; insurance of crops and live stock against loss from the action of the elements and other hazards; the insurance of property from damage by leakage of sprinkler equipment. Casualty companies, both domestic and foreign, do a business on these classes, premiums from which net them millions of dollars annually. (Rec. 40.) Insurance companies styled "foreign fire insurance companies," licensed by the state of Illinois, are taxed upon such receipts but domestic fire insurance companies and insurance companies who are in their charter styled "Casualty Companies," whether domestic or foreign, may under this decision write the same insurance without being subject to tax.

The real character of the tax here in question is for revenue. It is not a fee for a license or a charge to cover mere regulation, nor is any regulation incident to the payment of the tax. It is suggested in the opinion of the Supreme Court of Illinois in the case at bar, that the *reason* this tax is imposed upon the property of plaintiff in error while like property of others is free from tax, is because foreign fire insurance companies exercise valuable privileges, and the imposition of the tax is merely compensatory and therefore justifiable. That a tax upon property may incidentally burden foreign corporations and thereby encourage the growth of domestic companies, if assumed to be a legislative ground for discrimination, does not validate it. This court in the *Child Labor Tax case* (*Bailey v. Drexel Furniture Company*, 259 U. S. 20) discussed a related question (l. c. 38) and say:

"Taxes are occasionally imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them and with the in-

cidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive."

If the motive may be ascribed to the legislature of Illinois as the Supreme Court of that state indicates, to burden foreign insurance companies because they are foreign and do business only under a license, and therefore are taxed upon their property or the exercise of their vocation within the state on a basis entirely different from that imposed on citizens of the state, the existence of such a motive does not change the character of the imposition as a property tax in fact.

V.

Taxation of the net receipts of the plaintiff in error at their full value whereas other personal property by statutory direction is systematically and intentionally undervalued for the purpose of taxation, constitutes a denial of the equal protection of the laws.

By the uniform method adopted in taxation of property in Illinois at the time this tax was imposed upon plaintiff in error, the process of assessment was to first ascertain the full value of personal property; set down 60% of such amount in the full value column, and in the column headed "Assessed Value," one-half of the latter amount. The effect is that cash in bank or other personal property of a value equivalent to net receipts of the plaintiff in error would have a tax rate applied to only 30% of the value of the property. (Rec. 43.) The same rule applies to all other property and tax exactions in the state and since 1869 have been applied in the same manner to net premiums until levy of the tax now before the court. (Rec. 41.) That equality of treatment respecting net premiums and other property was contemplated by the Legislature is unconsciously recognized in the ma-

majority opinion in the Supreme Court of Illinois in this case, in which they say (Rec. 52)—

“The foreign fire insurance company takes its net proceeds from the vicinity of its agencies and it is but just that it return to the municipality in which its agency is located, something in lieu of the tax which would otherwise be realized from such net receipts as are taken away.”

If the net receipts were not taken away but remained in cash in the taxing jurisdiction, the taxes imposed thereon would be only 30% of what is imposed upon the net receipts of the plaintiff in error. Treating this tax either as a property tax or as a method of commutation of property tax, it has the vice of arbitrary and unwarrantable inequality, making it subject to inhibitions of the provisions of the Fourteenth Amendment to the Constitution of the United States.

As this court said in *Sioux City Bridge Company v. Dakota County*, 260 U. S. 441:

“* * * And it must be regarded as settled that intentional, systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property.”

The Supreme Court of Illinois has declared that this tax is designed to be a tax which “would otherwise be realized from such net receipts as are taken away,” and that “net receipts, of course, are personal property.” (Rec. 50.) The legislature having recognized net receipts to be property and undertaken to tax the net receipts as if they remained present in cash, such net receipts may not be taxed differently than other credits or property having a like fixed and determinable value, without thereby denying the plaintiff in error the equal protection of the laws. The net receipts from identical business received and physically on hand in the case of domestic fire insurers or casualty companies, foreign or domestic, would be taxed as personal property in the sum

of \$2150.49; whereas, plaintiff in error is made to pay a tax upon like receipts in the sum of \$7184.18.

Emphasis is laid by plaintiff in error upon the fact that though a statute may be constitutional, state officers may so administer it as to produce an unconstitutional result. We contend that under the decision of the Supreme Court of Illinois requiring net receipts of foreign insurance companies to be extended and taxed on the basis of one hundred percent while similar money or property of domestic insurance companies, Lloyds associations and individuals, etc. within the state are taxed at thirty percent, makes the administration of the law an unconstitutional exercise of power. This court has had occasion to deal with such situations before.

In *Greene v. Louisville Railroad Co.*, 244 U. S. 499, it was held that the administration of taxing statutes of Kentucky was unconstitutional and relief was accorded. The court in the opinion say:

"The principle is not confined to the maintenance of suits for restraining the enforcement of statutes which, as enacted by the state legislature, are in themselves unconstitutional. *Reagan v. Farmers' Loan & T. Co.*, 154 U. S. 362, 390, 38 L. ed. 1014, 1021, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047, was a case not of an unconstitutional statute, but a confiscatory, and therefore unconstitutional, action taken by a state commission under a constitutional statute. The court, by Mr. Justice Brewer, said: 'Neither will the constitutionality of the statute, if that be conceded, avail to oust the Federal court of jurisdiction. A valid law may be wrongfully administered by officers of the state, and so as to make such administration an illegal burden and exaction upon the individual. A tax law, as it leaves the legislative hands, may not be obnoxious, to any challenge, and yet the officers charged with the administration of that valid tax law may so act under it in the matter of assessment or collection as to work an illegal trespass upon the property rights of the individual.' In *Raymond v. Chicago Union Traction Co.*, 207 U. S. 20, 38, 52 L. ed. 78, 88, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757, the court upheld the right of action in a Federal court to restrain the col-

lection of taxes that had been assessed at a different rate and by a different method from that employed with respect to other taxpayers of the same class, in defiance of the provisions of a constitutional statute that required equalization, and also in denial of the equal protection of the laws within the meaning of the 14th Amendment.

"The contention of the plaintiffs, set forth in their respective bills of complaint, that the action of the Board of Valuation and Assessment in making the assessments under consideration and the threatened action of defendants in respect of carrying those assessments into effect constituted action by the state, and if carried out would violate the equal protection provision of the 14th Amendment presents, without question, a real and substantial controversy under the Constitution of the United States, which (there being involved a sum and value in excess of the jurisdictional amount) conferred jurisdiction upon the Federal court, irrespective of the citizenship of the parties. This being so, the jurisdiction of that court extended, and ours on appeal extends, to the determination of all questions involved in the case, including questions of state law, irrespective of the disposition that may be made of the Federal question, or whether it be found necessary to decide it at all. *Siler v. Louisville & N. R. Co.*, 213 U. S. 175, 191, 53 L. ed. 753, 757, 29 Sup. Ct. Rep. 451; *Ohio Tax Cases*, 232 U. S. 576, 586, 58 L. ed. 738, 743, 34 Sup. Ct. Rep. 372."

To the same effect is the decision of this court in *General American Tank Car Corporation v. Day*, (U. S. Sup. Ct.) 70 L. Ed. 239, (Advance Sheets of March 15, 1926). In testing the validity of taxes assessed under a statute of Louisiana, complaint was made that the taxes were discriminatory, and Mr. Justice Stone, in denying that contention said:

"There being no question as to the amount of the tax or the method of its computation, the taxation of appellants' property within the State can be open to no objection unless it operates to discriminate in some substantial way between the property of the appellants and the property of residents or domiciled non-residents. *Cudahy Packing Co. v. Minnesota*, 246 U. S. 450; *Pullman Palace Car Co. v. Pennsylvania*, 141 U. S. 18."

If there be no direct attack on a statute, nevertheless a federal question may be involved, if the action of administrative officers approved by the courts of a state, is such that it invades the constitutional rights of the party complaining. The Board of Review and like taxing bodies exercise delegated legislative powers, and if the terms of the legislative enactment proper, namely, the statute, present no unconstitutional aspects, yet the act of the administrative agencies may invade the constitutional rights of citizens and, if so, the same right to complain exists in the citizen as if the legislature had directly imposed the specific tax.

In the case of *Myles Salt Co. v. Iberia Drainage District*, 239 U. S. 478, coming to this court by error from the Supreme Court of the state, it was contended federal jurisdiction might not be taken because the constitutionality of a statute was not attacked, this court say:

"We cannot concur in the contention. It is true the law of the state as written is not attacked but the law as administered and justified by the Supreme Court of the state it attacked and it is asserted to be a violation of the constitution of the United States. The question presented is federal and the motion to dismiss is denied." *Fidelity & Deposit Co. v. Tafoya*, 46 Sup. Ct. Rep. 331; 70 Law Ed. 379 (March 15, 1926).

Other authorities in this court could be cited, but the principle is well established. The plaintiff in error submits that the intentional taxation of net receipts of foreign insurance companies at one hundred percent as against the exemption from taxation, or taxation upon greatly reduced valuation of exactly similar funds, or property produced from the same activities by residents or citizens of Illinois within the state, is a result that cannot be upheld as against constitutional considerations.

The uniformity of percentage of rate applied to other personal property as well as to net receipts does not make equality when the valuations to which the rate percent is

applied grossly differ. Taxing net receipts of plaintiff at one hundred percent of value, other property at thirty percent of value and exempting net receipts of other competing insurers from any tax is a denial of the equal protection of the laws.

Equality of burden cannot exist without uniformity in the basis of value to which rates are applied as well as in the percentage of rate.

Green v. Louisville & I. R. R. Co., 244 U. S. 512; 1 c. 515-518.

Cummings v. Merch. Natl. Bank, 101 U. S. 153.

Exchange Bank v. Hines, 3 Ohio State 1.

People v. Purdy, 231 U. S. 373.

VI.

If the tax be held an excise tax upon occupation or business, Section 30 as administered is nevertheless in violation of the equal protection clause of the Fourteenth Amendment, because the unreasonable classifications to which it is applied, create gross inequality of burden between those in the same occupation or business of insurance.

If the statute for consideration be held to impose a tax in the nature of an excise, this does not prevent inquiry as to its constitutionality.

In the case of *Western Union Telegraph Company v. State of Kansas*, 216 U. S. 1, although the case was one involving interstate commerce, the observations of the court, upon the general principles involved, may properly be invoked here.

Quoting from *Bain v. Burnside*, the court say:

"In all the cases in which the court has construed the subject of the granting by a state to a foreign corporation of its consent to the transaction of business in the state, it has uniformly asserted that no conditions can be imposed by the state which are repugnant to the constitution and laws of the United States."

Also, quoting from the same case, the court says that, where granting of a permit to do business is made

“dependent upon the surrender by the foreign corporation of a privilege secured to it by the constitution and laws of the United States, the statute requiring the permit must be held to be void.” (P. 36.)

We do not question that license fees and obligations may be imposed upon foreign insurance companies as a condition for entry into, and doing business in, the state of Illinois. In a case like the present, however, where the statute as applied has the effect to tax the foreign corporation upon its property, consisting of premium receipts to the extent of one hundred percent thereof, while other foreign insurance companies and domestic insurers are exempted and the burden upon petitioner is more than double the tax imposed upon premiums collected by domestic fire insurance companies, (namely, the tax rate is applied to premiums collected and in bank in the case of a domestic corporation to a scaled and debased value, but the tax rate applied to like net premiums received by a foreign insurance company without debasement or scaling,) such a result is a denial of the equal protection of the laws. Even if regarded as a commuted tax, or if styled an excise, it involves a supposed surrender of a privilege guaranteed by the constitution of the United States respecting equal protection of the laws and therefore is void.

Plaintiff in error having complied with conditions precedent to entry into the state, thereby becomes domiciled so that it may not have its property subjected to burdens in any way different from other citizens. (P. 38.)

As stated by a learned textwriter:

“A foreign corporation can not call in question the validity of any exaction which the state may require for the grant of its privilege. This obviously refers to the tax imposed for the privilege of acting in a corporate capacity in the state. It does not mean that after the corporation has been admitted into the state and paid the charge exacted for admission, it is not entitled to

due process of law or the equal protection of the law under the Federal Constitution or equality and uniformity of taxation under the state government."

Judson "Taxation," Sec. 178, 2nd ed.

Home Silver Mining Co. v. New York, 143 U. S. 305;
36 L. Ed. 164.

In a case (*Cotting v. Goddard*) involving what was unquestionably a "business tax," this court declared the provisions of the XIV Amendment to apply and held the law void.

In that case, a statute was for consideration limiting the charges of a stockyards corporation which received an average of more than 100 head of cattle or 300 head of sheep or 300 head of hogs per day, without limiting the charges of similar corporations doing a smaller business. It was held unconstitutional as denying to such corporation the equal protection of the laws.

The court say:

"While recognizing to the full extent the impossibilities of an imposition of duties and obligations mathematically equal upon all, and also recognizing the right of classification of industries and occupations, we must, nevertheless, always remember that the equal protection of the laws is guaranteed and that such equal protection is denied when, upon one of two parties engaged in the same kind of business under the same conditions, burdens are cast which are not cast upon the other."

Cotting v. Goddard, 183 U. S. 79.

In the case at bar, burdens are cast upon plaintiff in error not cast upon others engaged in the same kind of business under the same conditions.

Under the decision in the case at bar, and previous declarations in Illinois, it is held that *all* premiums of whatever kind derived by plaintiff in error and others in like position, are subject to taxation.

In *Berry v. City*, 320 Ill. 536, the Supreme Court of Illinois has, since the decision of the case at bar, laid down the rule which we believe is controlling here. In considering a case where fees were imposed upon the business of electrical contractors, the court held the ordinance in question violated the equality clause of the Fourteenth Amendment to the Constitution of the United States because the court held the ordinance there involved to be "in contravention of the equality clause where the classification or discrimination made by it is unreasonable or has no substantial relation to the object of the act." (P. 540.)

In holding what was an unlawful classification violating the XIV Amendment, the court said (at page 542):

"An act which arbitrarily discriminated against one class in the transaction of a business of a lawful occupation, and leaves unaffected by such discriminatory enactment other persons or classes of persons engaged in acquiring property in a manner not distinguishable in character from that in which the class discriminated against is employed, is in contravention of the constitutional guaranties under consideration."

The ground upon which the Supreme Court of Illinois holds the ordinance there before it to be invalid and contrary to the Fourteenth Amendment to the Federal constitution arises out of the fact that:

"Paragraph 100 by its terms exempts from its provisions all firms, one member of which has had at least two years' practical experience in installing and altering electrical equipment, etc. even though such member of the firm be a silent partner and have nothing whatever to do with the matter of contracting for the installation or alteration of electrical equipment. It also exempts all corporations which have one representative who has had experience, etc., even though such representative may be located in some other city and have nothing to do with the contracting or installation department of the corporation."

Under these circumstances the ordinances are held unconstitutional and invalid.

The case is not justly distinguishable from the case at bar, in that if a company has power in its charter to write fire insurance and another company does not have power in its charter so to do, the former is subjected to a tax as a business tax upon *all* its premiums, not only upon fire insurance but upon all classes, whereas the second company with premium income identical in every way is exempted from tax.

In the case of *Southern Railway Co. v. Greene*, 216 U. S. 400, l. c. 411, in addition to a license or privilege tax *per se*, there was imposed additionally an annual tax, called a franchise tax, from which corporations domiciled in the state were exempted. It involved substantially a business tax. The court, in holding it violative of constitutional guarantees, say, in contrasting foreign and domestic corporations:

“The effect is that both corporations do the same business in character and kind, and under the statute in question a foreign corporation may be taxed many thousands of dollars for the privilege of doing, within the state, exactly the same business as the domestic corporation is permitted to do by a tax upon its privilege, amounting to only a few hundred dollars. We hold, therefore, that to tax the foreign corporation for carrying on business under the circumstances shown, by a different and much more onerous rule than is used in taxing domestic corporations for the same privilege, is a denial of the equal protection of the laws, and the plaintiff being in position to invoke the protection of the Fourteenth Amendment, that such attempted taxation under the statute of the state does violence to the federal constitution.”

In the case of *Chalker v. Birmingham and Northwestern Railway Company*, 249 U. S. 522, this court had for review a judgment of the Supreme Court of Tennessee, brought to this court on error. The court considered a statute of Tennessee entitled “An Act to Provide Revenue for the State of Tennessee and the Counties and Municipalities thereof”

which said that the pursuit of "each vocation, occupation and business hereinafter named in this section is hereby declared to be a privilege." A tax of \$100.00 was imposed on each construction company with its chief office outside of the state and a fee of \$25.00 upon each domestic construction company having its chief office within the state. The court holds that the law discriminates in favor of the domestic citizen against one foreign to the state and, treating the imposition as an excise tax, the court say:

"Excise taxes, it is everywhere conceded, may be imposed by the states, if not in any sense discriminating; but it should not be forgotten that the people of the several states live under one common Constitution, which was ordained to establish justice, and which, with the laws of Congress, and the treaties made by the proper authority, is the supreme law of the land; and that that supreme law requires equality of burden, and forbids discrimination in state taxation when the power is applied to the citizens of the other states. Inequality of burden, as well as the want of uniformity in commercial regulations, was one of the grievances of the citizens under the Confederation; and the new Constitution was adopted, among other things, to remedy those defects in the prior system."

In the case of *Mutual Reserve Fund Life Association v. Augusta*, 109 Ga. 79; 35 S. E. Rep. 71, the court had for consideration a tax levied on gross premiums of non-resident insurance companies from which local companies were exempt. The court considered the tax in that case as a business tax and say that:

"Its legal effect is to impose a tax upon the gross premiums of non-resident insurance companies, and exempt the gross premiums of resident companies if such are now or should hereafter become established in the City of Augusta, while the ordinance remained in force. On the legal question involved, Judge Cooley, in his work on taxation (p. 99) says: 'The federal constitution provides that the citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states. The obvious purpose is to preclude the

several states from discriminating in their legislation against the citizens of other states. A state law, therefore, which imposed upon citizens of other states higher taxes or duties than are imposed upon citizens of the state laying them, is void,' citing *Wiley v. Farmer*, 14 Ala. 627; *Scott v. Watkins*, 22 Ark. 556; *Oliver v. Washington Mills*, 11 Allen 268. In construing the constitutional provisions as to the uniformity and *ad valorem* system to be enforced in this state, this court has repeatedly held that one business may be taxed, and not another. But the requirement as to this kind of taxation is that it shall be uniform upon all business of the same class. * * * It must therefore be held that the ordinance is invalid, and that no legal tax could be imposed under it, because of the discrimination made against nonresident companies and in favor of home companies."

In the case of *Wright v. Southern Bell Telephone Co.*, 127 Ga. 227, 56 S. E. Rep. 116, a tax was levied on telephone and other companies equal to the sum of two and one-half per cent and if the revenue derived from an *ad valorem* tax should not amount to two and one-half per cent of the gross receipts, the difference should be paid as an occupation tax, so that the total of *ad valorem* and occupation taxes combined should not be less than two and one-half per cent. The court hold that the tax before it

"is not a property tax, but an occupation tax. While the general assembly has no power to classify property for taxation, it is authorized to classify occupations; * * * but when a classification is made, the tax levied must be uniform upon each member of that class. *City of Atlanta v. Jacobs*, 125 Ga. 523; *Mutual Reserve Fund Life Association v. City of Augusta*, 109 Ga. 79. It is now settled in this state that an occupation tax may be lawfully created by imposing a tax upon the gross earnings of a business. But when an occupation tax of this character is levied, uniformity is still required, and every member of the class having the gross earnings, subject to taxation, must pay the same rate on its gross receipts. * * * Such being the character of that part of the act, which is invalid, no alternative is before us than to declare that the scheme of taxation under consideration in the section of the act, so far as it relates to an

occupation tax, is in violation of the constitution, and that the trial judge correctly enjoined the enforcement of the tax."

The case of *Pullman Palace Car Co. v. State*, 64 Tex. 274, 53 Am. Rep. 758, holds that where a business or occupation is taxed, all pursuing the business or occupation must be taxed in order to make the law valid. The tax there was imposed on Pullman cars but not on like cars owned by Texas railroads. In the course of the opinion the court say:

"If the things done constitute in one person or corporation the taxed occupation, no one doing the same things can be omitted from the class taxed, without a violation of the constitutional provision; even though the omitted or excepted person or corporation may do more or other things than are necessary to constitute the taxed occupation, and though that done in excess may, within itself, constitute a distinct occupation subject to taxation, however kindred in nature the occupation may be.

"The legislature may classify subjects of taxation and these classifications may, as they will, be more or less arbitrary; but when the classification is made all must be subject to the payment of the tax imposed, who, by the existence of the facts on which the classification is based, fall within it, unless exempted under some other constitutional provision."

It is not a violation of the Fourteenth Amendment to reasonably place burdens upon those in one class not placed upon those in another class, but such classifications must be reasonable, having in contemplation the objects to be attained. All persons similarly situated must be treated alike.

In the case of *Truax v. Corrigan*, 257 U. S. 312, this court declared the intent of the Fourteenth Amendment to be:

"That no impediment should be interposed to the pursuits of any one except as applied to the pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling or condition."

The court there speaks with emphasis on the "hostile discrimination" and the "oppression of inequity" which result from a violation of that intent.

The Supreme Court of Illinois, in the case at bar, holds that the tax here in question is a tax "assessed on the business of insurance done." (Rec. 49.)

The court further in its opinion says (Rec. 50):

"A tax on business as provided in this act is not, as argued, to be distinguished from a privilege tax."

As this court said in *Magoun v. Illinois Trust and Savings Bank*, 170 U. S. 283, 293, in speaking of the effect of the equality clause of the Fourteenth Amendment:

"It only prescribes that that law have the attribute of equality of operation, and equality of operation does not mean indiscriminate operation on persons merely as such, but on persons according to their relations. In some circumstances it may not tax A more than B, but if A be of a different trade or profession than B, it may."

The cases discussed under this subdivision of the brief are considered by this court in the case of *Marion L. Frost, et al. v. Railroad Commission of the State of California*, 70 L. Ed. 682 (decided June 7, 1926).

In that case, the issue was as to the constitutional validity of an act requiring a private carrier to secure certificate of public convenience and necessity, applicable to common carriers.

The court in that case say:

"There is involved in the inquiry not a single power, but two distinct powers. One of these—the power to prohibit the use of the public highways in proper cases—the state possesses; and the other—the power to compel a private carrier to assume against his will the duties and burdens of a common carrier—the state does not possess." (P. 684.)

The court further say: (P. 685)

"It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the Federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of a state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties imbedded in the constitution of the United States may thus be manipulated out of existence."

The court, quoting from the minority opinion in *Doyle v. Continental Insurance Company*, 94 U. S. 535 (the minority opinion being now the law of this court) say:

"Though a state may have the power, if it sees fit, to subject its citizens to the inconvenience of prohibiting all foreign corporations from transacting business within its jurisdiction, it has no power to impose unconstitutional conditions upon their doing so. Total prohibition may produce suffering, and may manifest a spirit of unfriendliness towards sister states; but prohibition, except upon conditions derogatory to the jurisdiction and sovereignty of the United States, is mischievous, and productive of hostility and disloyalty to the general government. If a state is unwise enough to legislate the one, it has no constitutional power to legislate the other." (P. 685-686.)

The limitation upon the power of a state is not narrowly limited by the specific cases to which it has been applied, for this court, in the *Frost case*, say (P. 687):

"And the principle, that a state is without power to impose an unconstitutional requirement as a condition

for granting a privilege, is broader than the applications thus far made of it."

See also

Fidelity & Deposit Co. v. Tafoya, 46 Sup. Ct. Rep. 331, 70 Law Ed. 379.

Whatever style may be given to the tax law here under consideration, in essence it is a law which provides that fire insurance companies foreign to the state, lawfully within its borders and licensed to do business there, may be subject to tax upon such lawful business, from the burdens of which others also lawfully doing identical business within the state are exempt. That the tax is one for revenue is not fairly disputable.

The Court of Errors and Appeals of New Jersey, in a most cogent manner, states the law on this subject:

"Considering the question in a theoretical point of view, it would seem to be clear that a state can not tax, for the purpose of revenue, a foreign corporation in a mode different in principle from that in which she can tax one of her own domestic corporations. It is not denied that the corporate existence of a company is recognized, not by right, but of grace in foreign jurisdictions, nor that each government has the competence to refuse to recognize such existence except on its own conditions. The principle is universally acknowledged. Hence laws requiring insurance companies * * * to file bonds and submit to other exactions as a prerequisite to their admission in an incorporated capacity into the state. Such laws, when rightfully made, are evidently mere police regulations, designed to protect the citizens of the state in which they are enacted from loss or imposition, and on this ground their legality can not be drawn into question. But a tax law, having revenue for its object, is based upon a principle entirely different. The right to tax for revenue is the right of the government to take so much of the property of the person or the company upon whom the tax falls as such government may deem necessary for its public wants. The act of taking the

property, therefore, must of necessity be an acknowledgment of the legal status of the person or company whose property is taken. To assert that a company whose property is thus taken, has no rights but such as the government taking it chooses to confer, is to assert that such company has no title to its property but such as may be conceded to it by the taking power.

‘It seems to be utterly inconsistent with legal principles, which have always been deemed axiomatic, to hold that a government can recognize the legal existence of a foreign corporation for the purpose of taxation, and at the same time can deny such legal existence, for the purpose of depriving it of those rights which belong to every individual or company known to the law. Such a doctrine would obviously offer the entire property of a foreign corporation as a prize to the rapacity of any state in whose territories it might be. It is readily to be conceded that a law imposing certain terms upon all foreign corporations, as conditions precedent to their acquisition in this state of the right to act in the unity of their corporate existence would be legal. Such law would prevent foreign persons from doing any legal act in this state as a corporation, but can it be maintained that such law would have the further effect of leaving the property of the company as the spoil of the first taker. * * * If a state, under a tax law, can require a foreign corporation to pay any sum it may please and then may defend itself against the alleged unconstitutionality of such act on the plea that the company taxed has no right but such as of grace may be conferred upon it, no reason is perceived why the general government could not at its pleasure seize the property of all corporations in this country on the ground that incorporated companies have no rights which the law is bound to respect or which are recognized by the Constitution of the United States. A principle involving such results is not admissible.’

Eric Railway Co. v. State, 31 N. J. L. 542-4.

To like effect see

2 Waterman on Corporations 283.

The tax here in question is asserted to be a tax upon business, but it does not act uniformly on all engaged in the same business. See also *Southern Railway Co. v. Greene*, 216 U. S. 400.

In the case of *Royster Guano Co. v. Virginia*, 253 U. S. 412, the exaction was on income derived from business. The court in that case said that a classification to be sustained must rest "upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike."

The court, in holding the tax in that case void, said:

"Nevertheless, a discriminatory tax law cannot be sustained against the complaint of a party aggrieved if the classification appear to be altogether illusory. * * * It is obvious that the ground of difference upon which the discrimination is rested has no fair or substantial relation to the proper object sought to be accomplished by the legislation."

The plaintiff in error is compelled, for example, to pay tax upon all crop insurance, upon all automobile theft and collision insurance and upon all sprinkler leakage insurance. They are competitively written by domestic fire insurance companies and by so-called casualty companies. The plaintiff in error has power by its charter and under license to do such business and like power is lodged in competitors to do an identical business. The plaintiff in error may not lawfully be subjected to tax upon such writings from which such others are exempted. It is not a valid classification in such a revenue producing law to put plaintiff in error into a burdened class from which such others are exempted merely because the charter of plaintiff in error permits it to do *fire* insurance, which right is denied to the casualty companies, whereas the tax is upon receipts from insurance upon crop, against action of the elements, such as wind and hail, sprinkler leakage, theft, collision, explosion, etc. To tax plaintiff

in error and entirely exempt domestic fire insurance companies doing an identical business and with identical charter powers makes the imposition void as a business tax.

If the premiums from insurance against the hazards of theft are taxable against the plaintiff in error and not taxable against a competitor which is in its charter called a "casualty insurance company," but also authorized to insure against identical theft hazards, then the classification by differences in charter powers having no relation to the business in fact transacted and upon which the tax is imposed, makes the classification entirely illusory and dependent upon matters entirely unrelated to the subject matter of the tax.

Section 30, as its application is defined and delimited by the Supreme Court of Illinois, has its basis in an entirely arbitrary and illusory classification. The tax purports to be upon premium receipts, but, according to the opinion of the court, is not subject to be levied upon specified property but to be a charge against the insurance company. A proper and reasonable classification should be one either of property or of persons. This so-called classification is neither. The tax is not applied upon consideration of the qualities or characteristics either of the property (net premium receipts), or of the person (the insurance company). If the classification were that of the thing subject to tax, namely, of the premiums, then the classification should be predicated upon likes or differences of such property. If predicated upon a classification of the persons receiving such receipts, it should be predicated upon differences inhering in the characteristics peculiar to the owner of the property.

To illustrate that this classification does not conform to or apply according either to the qualities of the property or the qualities of the owners, we present the following as an example:—

Assume four insurance companies, each confining its insurance writings in Illinois, during the year ending April 30, 1923, to theft, crop, collision and explosion insurance.

These four companies (designated companies A, B, C and D) all transact an identical business (the first four classes enumerated under each caption), and are respectively organized and *authorized* by their charters as follows:

A, organized under the laws of the state of New York, and authorized by its charter to write (1) theft, (2) crop, (3) collision, (4) explosion, and (5) fire insurance.

B, organized under the laws of the state of Illinois and licensed by the laws of Illinois, authorized by its charter to write (1) theft, (2) crop, (3) collision, (4) explosion, and (5) fire insurance.

C, organized under the laws of the state of New York and licensed in Illinois, authorized by its charter to write (1) theft, (2) crop, (3) collision, (4) explosion, and (5) workmen's compensation insurance.

D, organized under the laws of the state of Illinois and licensed in Illinois, authorized by its charter to write (1) theft, (2) crop, (3) collision, (4) explosion, and (5) workmen's compensation insurance.

Under the decision of the Supreme court in the case at bar, company A is subject to taxes upon all its net premium receipts; whereas companies B, C and D are tax exempt upon all their premium receipts, although there is an identity of insurance business by each of the four. The classification under the statute as delimited by the court does not rest upon any difference in the hazards *undertaken*, the character or amount of the premiums derived, or any other attribute of business done, or net receipts derived, for they are identical in each case. The classification does not rest upon the qualities inhering in the person of the owner of the net premiums for, whereas company A is foreign to the state of Illinois, company C is also foreign to the state of Illinois. The class-

ification by which taxes are imposed upon A and not upon B, C or D does not rest upon any difference in charter powers exercised, upon difference in quality or characteristics of premiums derived, upon the business done or the method of its conduct, nor in the character, whether domiciliary or foreign, of the owner of the property; but the classification rests entirely upon a grant of a charter power to one not existing as to the others, *whether such granted power be exercised or not.*

This so-called "business tax" does not predicate its classification as between taxable or tax free

- (a) upon differences in hazards in fact undertaken;
- (b) in difference in the character of net receipts derived;
- (c) in differences in the premium charges or conduct of business;
- (d) upon the status or characteristics of the owner.

Its classification rests upon a difference in an independent charter power whether exercised or not, unrelated to the power exercised, and then exempts some insurers also endowed with identical charter powers.

Concretely stated, it is not just classification to say that one insurer shall be taxed upon all the business of explosion insurance which he does in the state, and another corporation, whose domiciliary or foreign status is identical, held free from tax upon premiums derived from explosion writings, merely because the one company has the power, which the other has not, to insure other property against other hazards. There is no just relation between existence or non-existence of power to write fire insurance which warrants taxing theft, crop, collision and explosion insurance in one company and exempting that same insurance when written by another company contemporaneously and in competition.

In conclusion we call attention to the vicious principle underlying the law here for review, that tax burdens may at will be placed upon stock fire insurance companies because they are foreign to the state, and that domestic fire insurance companies, casualty insurers, mutual insurers, reciprocal insurers, individuals competitively engaging in the same business are to be tax free. This is a form of unconstitutional discrimination, the vicious nature of which was sensed fully by Justice Bradley in the minority opinion in *Doyle v. Continental Insurance Company*, 94 U. S. 535, (such minority opinion now being the law governing this court). In that case Mr. Justice Bradley says:

"The conditions of society and the modes of doing business in this country are such that a large part of its transactions is conducted through the agency of corporations. This is especially true with regard to the business of banking, insurance and transportation. Individuals cannot safely engage in enterprises of this sort, requiring large capital. They can only be successfully carried out by corporations, in which individuals may safely join their small contributions without endangering their entire fortunes. To shut these institutions out of neighboring States would not only cripple their energies, but would deprive the people of those States of the benefits of their enterprise. The business of insurance, particularly, can only be carried on with entire safety by scattering the risks over large areas of territory, so as to secure the benefits of the most extended average. The needs of the country require that corporations, at least those of a commercial or financial character, should be able to transact business in different states. If these States can, at will, deprive them of the right to resort to the courts of the United States, then, in large portions of the country, the Government and laws of the United States may be nullified and rendered inoperative with regard to a large class of transactions constitutionally belonging to their jurisdiction.

"The whole thing, however free from intentional disloyalty, is derogatory to that mutual comity and respect which ought to prevail between the State and General Governments, and ought to meet the condemnation of the courts whenever brought within their proper cognizance."

We respectfully submit that under the construction by the Supreme Court of Illinois the statute, the judgment here under review and the tax exaction and imposition merged therein, are repugnant to the guaranties of the Fourteenth Amendment and the judgment should be reversed.

Respectfully submitted,

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APPENDIX.

Text of Illinois statutes chronologically arranged.

ASSESSMENT ACTS OF 1853.

(Acts of February 12, 1853)

"An act for the assessment of property, and the collection of taxes, in counties adopting the township organization law."

Session Laws, Illinois, 1853, p. 3.

"An act for the assessment of property."

Session Laws, Illinois, 1853, p. 35.

Section 1 of both acts reads as follows:

"Be it enacted by the people of the state of Illinois, represented in the General Assembly, That all property, whether real or personal, in this state; all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise, of persons residing in this state, or used or controlled by persons residing in this state; the property of corporations now existing or hereafter created, and the property of all banks, or banking companies, now existing, or hereafter created, and of all bankers and brokers, except such property as is hereinafter expressly exempted, shall be subject to taxation; and such property, moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise, or the value thereof, shall be entered on the list of taxable property, for that purpose, in the manner prescribed in this act."

Session Laws, 1853, p. 3.

The subhead preceding section 20 and sections 20, 21, and 22 are identical in both acts and are as follows:

“OF LISTING AND VALUING THE PROPERTY OF BANKS AND BANKING COMPANIES, AND OTHER CORPORATIONS.”

The act provides:

It shall be the duty of the president and cashier of every bank or banking company that shall have been or may be hereafter incorporated by the laws of this state, and having the right to issue bills for circulation as money, to make out and return to the bank commissioners, in the month of May annually, a written statement, containing the average amount of notes and bills discounted or purchased by such bank or banking company, which amount shall include all the loans or discounts of such bank or banking company, whether originally made or renewed during the year next preceeding the first of May aforesaid, or at any time previous, whether made on bills of exchange, notes, bonds, mortgages, or any other evidence of indebtedness, at their actual value in money, whether due previous to, during, or after the period aforesaid, and on which such bank or banking company has at any time reserved or received, or is entitled to receive any profit or other consideration whatever, either in the shape of interest, discount, exchange or otherwise. Stocks deposited with the state treasurer shall be valued at the rate at which they are deposited. The bank commissioners shall proceed to ascertain the amount of the property valued in accordance with the provisions of this act, and make return thereof to the auditor, who shall report the same to the clerk of the proper county, and said clerk shall enter the same on the tax list for taxation.

To ascertain the amount of the notes and bills discounted and purchased, and all other effects or dues, of every description, belonging to such bank or banking company, and liable to taxation, there shall be taken as a criterion the average amount of the aforesaid items for each month during the year next previous to the time of making such statement, if such bank or banking company shall have been so long engaged in business, and if not, then during such time as such

bank or banking company shall have been engaged in business; and the average shall be made by adding together the amount so found belonging to such bank or banking company in each month said bank or banking company was so engaged in business, and dividing the same by the number of months said bank or banking company was thus engaged in business.

The president, secretary, or principal accounting officer of every railroad company, turnpike or plank road company, insurance company, telegraph company, or other joint-stock company, except corporations whose taxation is specifically provided for by law, for whatever purpose they may have been created, whether incorporated by any law of this state or not, shall list for taxation, at its actual value, its real and personal property, moneys and credits, within this state, in the manner following:

In all cases return shall be made to the assessor of each of the respective counties where such property may be situated, together with a statement of the amount of said property which is situated in each county, town, city, or ward therein.

The value of all moveable property shall be added to the stationary and fixed property and real estate, and apportioned to such wards, towns, cities, and counties, *pro rata*, in proportion to the value of the real estate and fixed property in said ward, town, city or county. The capital stock of bridge companies shall be assessed in the town where their principal office is located.

If the county assessor to whom returns are made is of opinion that false or incorrect valuations have been made, or that the property of the corporation or association has not been listed at its true value, or that it has not been listed in the location where it properly belongs, or in cases where no return has been made to the county assessor, he is hereby required to proceed to have the same valued and assessed in the same manner as is prescribed in the several sections of this act regulating the duties of county assessors in cases of

refusal or neglect to list property: *Provided*, that every agency of an insurance company, incorporated by the authority of any other state or government, shall return to the assessor of the county in which the office or agency of such company may be kept, in the month of May, annually, the amount of the gross receipts of such agency, which shall be entered on the tax list of the proper county, and subject to the same rate of taxation for all purposes that other personal property is subject to at the place where located.

Session Laws, 1853, pp. 12-14.

FIRE, MARINE AND INLAND NAVIGATION INSURANCE COMPANY ACT.
(Act of March 11, 1869)

Title "An act to incorporate and to govern fire, marine and inland navigation insurance companies doing business in the State of Illinois."

Section 22 of Act of March 11, 1869:

"It shall not be lawful for any insurance company, association or partnership incorporated by or organized under the laws of any other state of the United States, or any foreign government for any of the purposes specified in this Act, directly or indirectly, to take risks or transact any business of insurance in this State unless possessed of the amount of actual capital required of similar companies formed under the provisions of this Act; nor shall it be lawful for any mutual insurance company of any other state to transact any kind of business within this State other than that prescribed by section 13 of this Act, unless said company is possessed of an amount of cash assets over and above all liabilities, including re-insurance reserve equal to the amount of capital stock required of stock companies; and any such company desiring to transact any such business as aforesaid by any agent or agents in this State, shall first appoint an attorney in this State on whom process of law can be served, and file

in the office of the Director of Trade and Commerce a written instrument duly signed and sealed, certifying such appointment, which shall continue until another attorney be substituted, and in case of death or removal of said attorney so designated by said company, service of any process from any court in this State on the Director of Trade and Commerce during such vacancy shall be sufficient until said company shall appoint another attorney, as required by this Act; and any process issued by any court of record in this State and served upon such attorney by the proper officer of the county in which such attorney may reside, or may be found, shall be deemed a sufficient service of process upon such company, but service of process upon such company may also be made in any other manner provided by law.

In case any insurance company not incorporated in this State shall cease to transact business in the State according to the laws thereof, the agents last designated or acting as such for such corporation, shall be deemed to continue agents for such corporation for the purpose of serving process for commencing action upon any policy or liability issued or contracted while such corporation transacted business in this State, and service of such process for the cause aforesaid, upon any such agent, shall be deemed a valid personal service upon such corporation.

And every such company, association or partnership shall also file a certified copy of their charter or deed of settlement, together with a statement, under the oath of the president or vice-president or other chief officer and secretary of the company for which he or they may act, stating the name of the company and place where located, the amount of its capital, with a detailed statement of its assets, showing the amount of cash on hand, in bank or in the hands of agents, the amount of real estate and how the same is incumbered by mortgage, the number of shares of stock of every kind owned by the company, the par and market value of the same, amount loaned

on each, and the estimated value of the whole amount of such securities; any other assets or property of the company, also stating the indebtedness of the company, the amount of losses adjusted and unpaid, the amount incurred and in process of adjustment, the amount resisted by the company as illegal and fraudulent, and all other claims existing against the company; also a copy of the last annual report, if any, made under any law of the state by which said company was incorporated, and no agent shall be allowed to transact business for any such company whose capital (or if a mutual company whose re-insurance reserve as required in section 13 of this Act) is impaired to the extent of 20 per cent thereof, while such deficiency shall continue.

And any company incorporated by or organized under any foreign government shall, in addition to the foregoing, deposit with the Director of Trade and Commerce for the benefit and security of policyholders residing in the United States a sum not less than two hundred thousand dollars (\$200,000), in stocks of the United States, or of the State of Illinois, in all cases to be equal to a stock producing six per cent per annum—said stocks not to be received by said Director of Trade and Commerce at a rate above their par value, or above their current market value—or in bonds and mortgages on improved unincumbered real estate in the State of Illinois, worth fifty per cent more than the amount loaned thereon.

The stocks and securities so deposited may be exchanged from time to time for other securities, as aforesaid.

And so long as the company so depositing shall continue solvent, and comply with the laws of this State, such company or association may be permitted by the Director of Trade and Commerce to collect the interest or dividends on said deposits; and where a deposit is made of bonds and mortgages, accompanied by full abstracts of title and searches, the fees for an examination of title by counsel, to be paid by the party making the deposit, shall not exceed twenty dollars for each

mortgage, and the fee for an appraisal of property shall be five dollars to each appraiser, not exceeding two, besides expenses for mortgage.

Nor shall it be lawful for any agent or agents to act for any company or companies referred to in this section, directly or indirectly, in taking risks or transacting the business of fire and inland navigation insurance in this State, without procuring annually from the Director of Trade and Commerce, a certificate of authority, stating that such company has complied with all the requisitions of this Act which apply to such companies, and the name of the attorney appointed to act for the company.

The statement and evidences of investments required by this section shall be renewed from year to year, in such manner and form as may be required by said Director of Trade and Commerce, with an additional statement of the amount of premiums received and losses incurred in the State during the preceding year, so long as such agency continues, and said Director of Trade and Commerce, on being satisfied that the capital securities and investments remain secure, as heretofore provided, shall furnish a renewal of the certificate as aforesaid.

Any violation of any of the provisions of this Act shall subject the party violating the same to a penalty not exceeding five hundred dollars for each violation, and of the additional sum of one hundred dollars for each month during which any such agent shall neglect to file such affidavits and statements as are herein required.

Every agent of any insurance company, shall in all advertisements of such agency, publish the location of the company, giving the name of the city, town or village in which the company is located, and the state or government under the laws of which it is organized. The term "agent" or "agents" used in this section shall include an acknowledged agent, surveyor, broker or any other person or persons who shall in

any manner aid in transacting the insurance business of any insurance company not incorporated by the laws of this State.

The provisions of this section shall apply to all foreign companies, partnerships, associations and individuals whether incorporated or not. All insurance companies, associations or partnerships, incorporated by or organized under the laws of any other state of the United States, or any foreign government, transacting the business of fire or marine insurance, or any other kind of insurance in this State, shall make annual statements of their condition and affairs to the Director of Trade and Commerce, in the same manner and in the same form as similar companies organized under the laws of this State.

In case of neglect or refusal to make such annual statement as aforesaid, all persons acting in this state as agents or otherwise in transacting the business of insurance for said companies, corporations, associations, partnerships or individuals, shall be subject to the same penalties provided by law in case of the failure of any insurance company organized under the laws of this State to make an annual statement as provided in this Act.

Foreign insurance companies shall be required to make and file their annual statements and evidences on or before the first day of March in each year, made out for the year ending on the preceding 30th of September. The supplementary annual statements of their business and affairs in the United States, duly verified by the resident manager of such company, shall be filled on or before the first day of March of each year, made out for the year ending on the 31st day of December immediately preceding."

Par. 150, ch. 73, Cahill's Rev. St. (1925)

Section 22½, Act of March 11, 1869:

"If the Auditor has or shall have at any time satisfactory evidence that any annual statement or other report re-

quired or authorized by this Act, made or to be made by any officer or officers, agent or agents of any corporation, association or partnership, incorporated by or organized under the laws of any State of the United States or any foreign government, is false, it shall be the duty of said Auditor to immediately revoke the certificate of authority granted on behalf of such corporation, association or partnership, and mail a copy of such revocation to each agent thereof in this State. And the agent or agents of such corporation, association or partnership, after such notice, shall discontinue the issuing of any new policy and the renewal of any policy previously issued; and such revocation shall not be set aside nor any new certificate of authority given until satisfactory evidence shall have been furnished to said Auditor that such corporation, association or partnership is in substance and in fact in the condition set forth in such false statement or report, and that all the requirements of said Act are fully complied with."

Par. 151, ch. 73, Cahill's Rev. St. (1925)

Section 23, Act of March 11, 1869:

"It shall be the duty of the insurance superintendent, whenever he shall deem it expedient so to do, in person, or by one or more persons to be appointed by him for that purpose, not officers or agents of, or in any manner interested in any insurance company doing business in this State, except as policyholders, to examine into the affairs of any insurance company incorporated in this State, or doing business by its agents in this State; and it shall be the duty of the officers or the agents of any such company doing business in this State, to cause their books to be opened for inspection of the insurance superintendent, or the person or persons so appointed, and otherwise to facilitate such examinations, so far as it may be in their power to do, and to pay all reasonable expenses incurred therein, and for that purpose the said insurance superintendent, or person or persons so appointed by him, shall have the power to examine, under oath, the officers

and agents of any company relative to the business of said company; and whenever the said insurance superintendent shall deem it for the best interest of the public so to do, he shall publish the result of said investigation in one or more papers in this State.

And whenever it shall appear to the said insurance superintendent from such examination, that the assets of any company incorporated in this State are insufficient to justify the continuance in business of any such company, he may direct the officers thereof to require the stockholders (or if a mutual company the members thereof) to pay in the amount of such deficiency within such periods as he may designate in such requisition; or he may apply to the circuit court of the county in which the principal office of said company shall be located for an order requiring them to show cause why the business of such company shall not be closed, and the court shall thereupon proceed to hear the allegations and proofs of the respective parties; and in case it shall appear to the satisfaction of said court that the assets and funds of said company are not sufficient as aforesaid, or that the interests of the public so require, the said court shall decree a dissolution of said company and a distribution of its effects. The said circuit court shall have power to refer said application to a master in chancery to inquire into and report upon the facts stated therein. Any company receiving the aforesaid requisition from the said insurance superintendent shall forthwith call upon its stockholders for such amounts as will make its capital equal to the amounts fixed by the charter of said company; and in case any stockholder of such company shall refuse or neglect to pay the amount so called for, after notice personally given, or by advertisement, in such time and manner as the said insurance superintendent shall approve, it shall be lawful for the said company to require the return of the original certificate of stock held by such stockholder, and, in lieu thereof, to issue new certificates for such number of shares as the said stockholder may be entitled to, in the pro-

portion that the ascertained value of the funds of the said company may be found to bear to the original capital of the said company—the value of such shares for which new certificates shall be issued, to be ascertained under the direction of the said insurance superintendent and the company paying for the fractional parts of shares; and it shall be lawful for the directors of such company to create new stock and dispose of the same, and to issue new certificates therefor, to an amount sufficient to make up the original capital of the company.

And it is hereby declared that, in the event of any additional losses accruing upon new risks taken after the expiration of the period limited by the said insurance superintendent in the aforesaid requisition for the filling up of the deficiency in the capital of such company, and before said deficiency shall be made up, the directors shall be individually liable to the extent thereof.

And if, upon examination, it shall appear to the said insurance superintendent that the assets of any company chartered on the plan of mutual insurance under this act are insufficient to justify the continuance of such company in business, it shall be his duty to proceed in relation to such company in the same manner as is herein required in regard to joint stock companies, and the trustees or directors of such company are hereby made personally liable for any losses which may be sustained upon risks taken after the expiration of the period limited by said insurance superintendent for filling up the deficiency in the capital, and before such deficiency shall have been made up.

Any transfer of stock of any company organized under this act, made during the pending of any such investigation, shall not release the party making the transfer from his liability for losses which may have accrued previous to the transfer.

And whenever it shall appear to the said insurance superintendent from the report of the person or persons appointed

by him, that the affairs of any company not incorporated by the laws of this State are in an unsound condition, he shall revoke the certificates granted in behalf of such company, and shall cause a notification thereof to be published in a newspaper of general circulation published in the city of Springfield, and mail a copy thereof to each agent of the company; and the agent or agents of such company, after such notice, shall be required to discontinue the issuing of any new policy and the renewal of any previously issued."

Par. 152, ch. 73, Cahill's Rev. St. (1925)

Section 27, Act of March 11, 1869:

"There shall be paid by every company, association, person or persons, or agent, to whom this Act shall apply, the following fees: For filing the declaration or the certified copy of a charter herein required, the sum of \$30; for filing the annual statement required, \$10; for each certificate of authority to agents of companies or associations not incorporated under the laws of this State, \$2; for each certificate of authority to agents of companies incorporated under the laws of this State, fifty cents; for every copy of paper filed in his office, the sum of twenty cents per folio; and for affixing the seal of said office to such copy and certifying the same, \$1; and in case two or more companies shall combine and effect insurance, under a joint policy, each and every company shall pay the fees provided herein, the same as if each company wrote separate and distinct policies: *Provided*, that the net amount of all fees over and above the cost of performing the clerical labor connected therewith shall not exceed, under this Act, the sum of \$5,000, and that any amount above that sum shall be paid over to the State Treasurer: *And, provided further*, that the Auditor shall render account, in his biennial report, of the fees received by him under the provisions of this Act."

Sec. 29, Act of March 11, 1869:

"Whenever the existing or future laws of any state of the United States, or any other kingdom or country, shall require of insurance companies incorporated by or organized under the laws of this State, and having agencies in such other State, kingdom or country, any deposit or securities in such State, kingdom or country, for the protection of policy-holders or otherwise, of any payment for taxes, fines, penalties, certificates of authority, license fees or otherwise, greater than the amount required for such purposes from similar companies of other States by the then existing laws of this State, then and in every such case, all companies of such States, establishing or having heretofore established an agency or agencies in the State, shall be and are hereby required to make the same deposit, for a like purpose, with the Auditor of this State, and to pay to the Auditor, for taxes, fines, penalties, certificate of authority, license fees, and otherwise an amount equal to the amount of such charges and payments imposed by the laws of such State upon the companies of this State and the agents thereof: PROVIDED, that the payment required of such foreign companies shall, in no case, be less than required by this Act."

Cahill's Rev. St. Ill. (1925) Ch. 73, Sec. 158.

ADDITIONAL CAUSES OF FORFEITURE OF LICENSE—

REMOVAL OF CAUSES.

(Act of June 4, 1879)

"An act for the better regulation of the business of insurance, and for the protection of the citizens of this state, in their dealings with insurance companies."

Section 1:

"It shall not be lawful for any insurance company, association or partnership incorporated by, or organized under the laws of any other state of the United States, or of any

foreign government for the purpose of insuring against loss or damage by fire, or against the risks of inland navigation or transportation, or for the purpose of life insurance, or for the purpose of insuring persons against accidents, to take risks or to transact any business whatever authorized by its charter within this State, until it shall have complied with the following requirements, in addition to those already imposed by existing law; it shall first file with the Auditor of Public Accounts a written application for a license to do business in this State, duly signed by its president and secretary, with its corporate seal attached, which statement shall contain the following declarations: that it desires to transact the business of insurance in this State; that it will accept a license therefor according to the laws of this State, and that said license shall cease and terminate in case, and whenever it shall remove or make application to remove into any United States court, any action or proceeding commenced in any of the State courts, of this State, upon any claim or cause of action arising out of any business transaction, in fact, done in this State; any permission, consent, agreement, condition or provision incorporated in any contract, mortgage, note, bond, obligation or policy of insurance authorizing or consenting to such removal, to the contrary notwithstanding."

Ill. Rev. St. 1925 (Cahill) Ch. 73, Sec. 71, p. 1387.

Section 3:

"If any such incorporated company, association or partnership shall remove, or make application to remove into any United States court, any action or proceeding commenced in any State court of this State upon a claim or cause of action arising out of any business, or transaction in fact done in this State although there may have been a stipulation authorizing such removal, or if it shall violate, or fail to comply with, any of the other requirements or conditions now imposed by existing law, it is hereby made the imperative duty of the Auditor of Public Accounts, at once to revoke, cancel

and annul the license issued to such incorporated company, association or partnership; and thereafter no such incorporated company, association or partnership shall transact within this State any of the business for which it was incorporated, until again duly licensed. In case such revocation of license shall be made because of the removal of, or the attempt to remove any action from a State court of this State to any United States court no renewal of such license shall be made within three years after such revocation. Whenever any such license shall be revoked, the Auditor of Public Accounts shall give notice of such revocation by mail, to the president and secretary of such corporation and shall also cause a notice of the same to be published three times in some weekly public newspaper published in the city of Springfield. A certified copy of the order of removal, shall be sufficient evidence of the removal of any cause."

Ill. Rev. St. 1925 (Cahill) Ch. 73, Sec. 73, p. 1388.

INSURANCE THROUGH LEGALLY AUTHORIZED AGENTS.

(Act of June 22, 1893)

"An act providing a penalty for a violation of section 30 of an act entitled 'an act to incorporate and govern fire, marine and inland navigation insurance companies doing business in the State of Illinois,' approved and in force March 11, 1869."

Section 1:

"That it shall be unlawful for any insurance company legally authorized to transact business in the State of Illinois to write, place or cause to be written or placed any policy or contract for indemnity for insurance upon property situated or located in the State of Illinois except through legally authorized agents in the State of Illinois, and the writing, placing or causing to be placed any such policy of insurance is hereby declared to be a violation of the law provid-

ing for the payment of taxes by foreign insurance companies doing business in the State of Illinois as provided in section 30 of an act entitled 'An Act to incorporate and govern fire, marine and inland navigation insurance companies doing business in the State of Illinois,' approved and in force March 11, 1869."

Par. 160, ch. 73, Cahill's Rev. St. (1925).

Section 2:

"Any company violating the provisions of the first section of this Act upon notice and satisfactory proof thereof being made to the Auditor of Public Accounts of the State of Illinois, shall have its authority to transact business in the State of Illinois revoked by said Auditor of Public Accounts for a period of not less than ninety days, and any insurance company whose license is so revoked by said Auditor shall not be again permitted to do business in Illinois until all taxes and penalties due thereon shall have been paid, together with any expenses that may be due (under) the provisions of this Act to the Auditor of Public Accounts of the State of Illinois, and such company shall only be re-authorized to transact business in the State of Illinois upon a complete compliance with the laws of this State governing fire, marine and inland insurance companies."

Par. 161, ch. 73, Cahill's Rev. St. (1925).

Section 3:

"When notice of any violation of the first section of this Act is received by the Auditor of Public Accounts of the State of Illinois, that it shall forthwith be his duty, in person or by deputy, to visit the office of such company where such contract of insurance has been written or made, and demand an inspection of the books and records of such company. Any company refusing to exhibit its books and records for his inspection shall be deemed guilty of violating the provisions

of the first section of this Act, and the penalties provided in this Act shall immediately be enforced against such company by the Auditor of Public Accounts.

Par. 162, ch. 73, Cahill's Rev. St. (1925).

GENERAL REVENUE ACT—FULL VALUE—ASSESSED VALUE.

(Act of February 25, 1898).

"An act for the assessment of property and providing the means therefor, and to repeal a certain act therein named."

Section 18:

"Personal property shall be valued at its fair cash value, less such deductions as may be allowed by law from credits, which value shall be set down in one column, to be headed 'full value,' and one-half part thereof shall be ascertained and set down in another column which shall be headed 'assessed value.' * * * The one-half value of all property so ascertained and set down shall be the assessed value for all purposes of taxation, limitation of taxation and limitation of indebtedness prescribed in the constitution or any statute."

Par. 329, ch. 120, Cahill's Rev. St. (1925).

AN ACT RELATING TO (CONCERNING THE BUSINESS OF) CASUALTY COMPANIES. ILLINOIS REVISED STATUTES (CAHILL)

1925 CH. 73, SEC. 447, P. 1446.

Approved April 21, 1899. In force July 1, 1899. L. 1899, p. 237. Title as amended by L. 1919, p. 601, June 30, July 1.

447. WHO MAY FORM—PURPOSE.) Section 1. Any number of persons, not less than thirteen, may, in the manner hereinafter prescribed, form a corporation for the purpose of issuing policies for any of the following kinds of insurance business: * * *

Fourth—Against loss by burglary or theft or both.

Fifth—Upon glass against breakage.

Sixth—Upon steam boilers and pipes, engines and machinery connected therewith or operated thereby; against explosion and accident and loss or damage to life or property resulting therefrom and to make inspection of and to issue certificates of inspection upon such boilers and pipes, engines and machinery; also upon elevators and machinery forming a part thereof and to make inspection and to issue certificates of inspection upon the same.

Seventh—Insuring against any hazard resulting from the ownership, maintenance or use of any automobile or other vehicle.

Eighth—Against any other casualty or insurance risk specified in the articles of organization, which may lawfully be the subject of insurance and the formation of corporations for insuring against which is not otherwise provided for by these statutes.

As amended by L. 1921, p. 473, June 28, July 1."

"453. FOREIGN CASUALTY INSURANCE COMPANY, WHEN AUTHORIZED TO TRANSACT BUSINESS IN ILLINOIS.)

7. Any casualty insurance corporation organized under the laws of any other state or foreign country may be admitted to transact business in this State by filing with the insurance superintendent for his approval, the following documents and papers: * * *

Fourth—A COMPLETE STATEMENT OF THE FINANCIAL CONDITION OF THE CORPORATION.) All such corporations admitted to transact business in this State must comply with the laws governing like corporations organized under the laws of this State. * * * The said company shall apply annually to the insurance superintendent for a certificate for each of its agents to do business in this State."

PRIVILEGE TAX ACT OF 1919.

(Act of June 28, 1919).

"An act in relation to the taxation of non-resident corporations, companies and associations for the privilege of doing an insurance business in this State."

Section 1:

"That each non-resident corporation, company and association licensed and admitted to do an insurance business in this State shall, except as herein otherwise provided, pay an annual State tax for the privilege of doing an insurance business in this State, equal to two per centum on the gross amount of premiums received during the preceding calendar year on contracts covering risks within this State, which gross amount of premiums shall include all premiums received during the preceding calendar year on all policies, annuity contracts, certificates, renewals, policies subsequently cancelled, insurance and reinsurance executed, issued and delivered during such preceding calendar year, and all premiums that are received during such preceding calendar year on all policies, annuity contracts, certificates, renewals, policies subsequently cancelled, insurance and reinsurance executed, issued and delivered in all years prior to such preceding calendar year, whether such premiums were in the form of money, notes, credits, or any other substitute for money, after deducting from such gross amount of premiums the amount of returned premiums on cancelled policies covering risks within this state (but returns on life insurance policies, commonly known as surrender values, shall not be considered returned premiums on cancelled policies); also the amount paid for reinsurance of risks within this State to companies duly licensed to transact business in this State, and also the amount returned to holders of policies on risks within this State as dividends paid in cash or applied in the reduction of premiums.

There shall be deducted from the tax thus computed the amount (if any) paid by such corporation, company or association, to cities and villages as a tax on premiums received by such corporation, company or association in such cities and villages during the preceding calendar year for the benefit of organized fire departments, and the remainder shall be assessed against such corporation, company or association as its annual privilege tax.

This Act shall apply to all corporations, companies and associations organized under the laws of any other state, territory or foreign country and admitted to transact the business of insurance in this State on the stock, mutual, or assessment plan. This act, however, shall not apply to fraternal beneficiary associations or societies.

The tax herein provided for shall be in lieu of all license fees or privilege or occupation taxes levied or assessed by any municipality in this State, and no municipality shall impose any license fee or privilege or occupation tax upon any such corporation, company or association, or any of its agents, for the privilege of doing an insurance business therein; but this act shall not be construed to prohibit the levy and collection of any State, county or municipal taxes upon the real and personal property of such corporations, companies and associations, nor to prohibit the levy and collections of taxes for the benefit of organized fire departments in cities and villages, nor to prevent the levy and collection of taxes for the purpose of maintaining the office of the Fire Marshal of this State and paying the expenses incident, nor to prevent the levy and collection of the tax authorized by section 30 of an act entitled, "An Act to incorporate and to govern fire, marine and inland navigation insurance companies doing business in the State of Illinois," approved March 11, 1869, in force July 1, 1869, as amended.

Par. 79, ch. 73, Cahill's Rev. St. (1925).

Section 12:

"If any corporation, company or association shall fail, neglect or refuse to make and file any report herein required, or shall fail, neglect or refuse to pay any tax assessment against it under the provisions of this Act, within thirty days after the same becomes due and payable, the Department of Trade and Commerce shall have power to revoke the license of such defaulting corporation, company or association to transact the business of insurance in this State, or it may suspend the same until such report or reports are filed or such tax and penalties (if any) are paid."

Par. 90, ch. 73, Cahill's Rev. St. (1925).

ENABLING PROVISIONS OF ACT OF MARCH 11, 1869, BEING
SEC. 1 AS AMENDED.

127. WHO MAY FORM CORPORATION—PURPOSES.) Section 1. That any number of persons, not less than thirteen (13), may associate and form an incorporated company for the following purposes, to wit: To make insurance on dwelling houses, stores, and all kinds of buildings, and upon household furniture and other property, against loss or damage by fire, lightning and tornadoes, or either or any of said causes and the risks of inland navigation and transportation. Any and all insurance companies heretofore or hereafter incorporated under the provisions of this Act, which shall, in the declaration and charter provided to be filed, have expressed an intention to make insurance, or shall have power to make insurance against loss or damage by the risks of inland navigation or transportation, shall have power to make insurance upon vessels, boats, cargoes, goods, merchandise, freights, and other property, against loss and damage by all or any of the risks of ocean, lake, river, canal and inland navigation and transportation, and against loss or damage by explosion, whether fire ensues or not, except upon

steam boilers and pipes, flywheels, engines and machinery connected therewith or operated thereby.

As amended by L. 1879, p. 178, May 31, July 1; L. 1881, p. 99, May 25, July 1; L. 1912, p. 45, June 11, July 1; L. 1919, p. 613, May 21, July 1."

Cahill's Rev. St. Ill. (1925), Ch. 73, Sec. 127, p. 1397.

128. INSURANCE OF MOTOR VEHICLES.) Sec. 1-a. That all insurance companies authorized to transact the business of fire, marine or inland navigation insurance in this State, may, in addition to the business which they are now authorized by law to do, insure automobiles or other motor vehicles, whether stationary or being operated under their own power, against all or any of the risks of fire, lightning, windstorm, tornadoes, cyclones, explosions, hailstorms, transportation by land or by water, theft and collision, upon filing with the Insurance Department of the State of Illinois official notification of their purpose so to do; *provided*, the same shall be clearly expressed in the policies.

Added by L. 1912, p. 45, June 11, July 1.

Cahill's Rev. St. Ill. (1925), Ch. 73 Sec. 128, p. 1397.

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No. 179

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1926.

HANOVER FIRE INSURANCE COMPANY,
Plaintiff in Error,

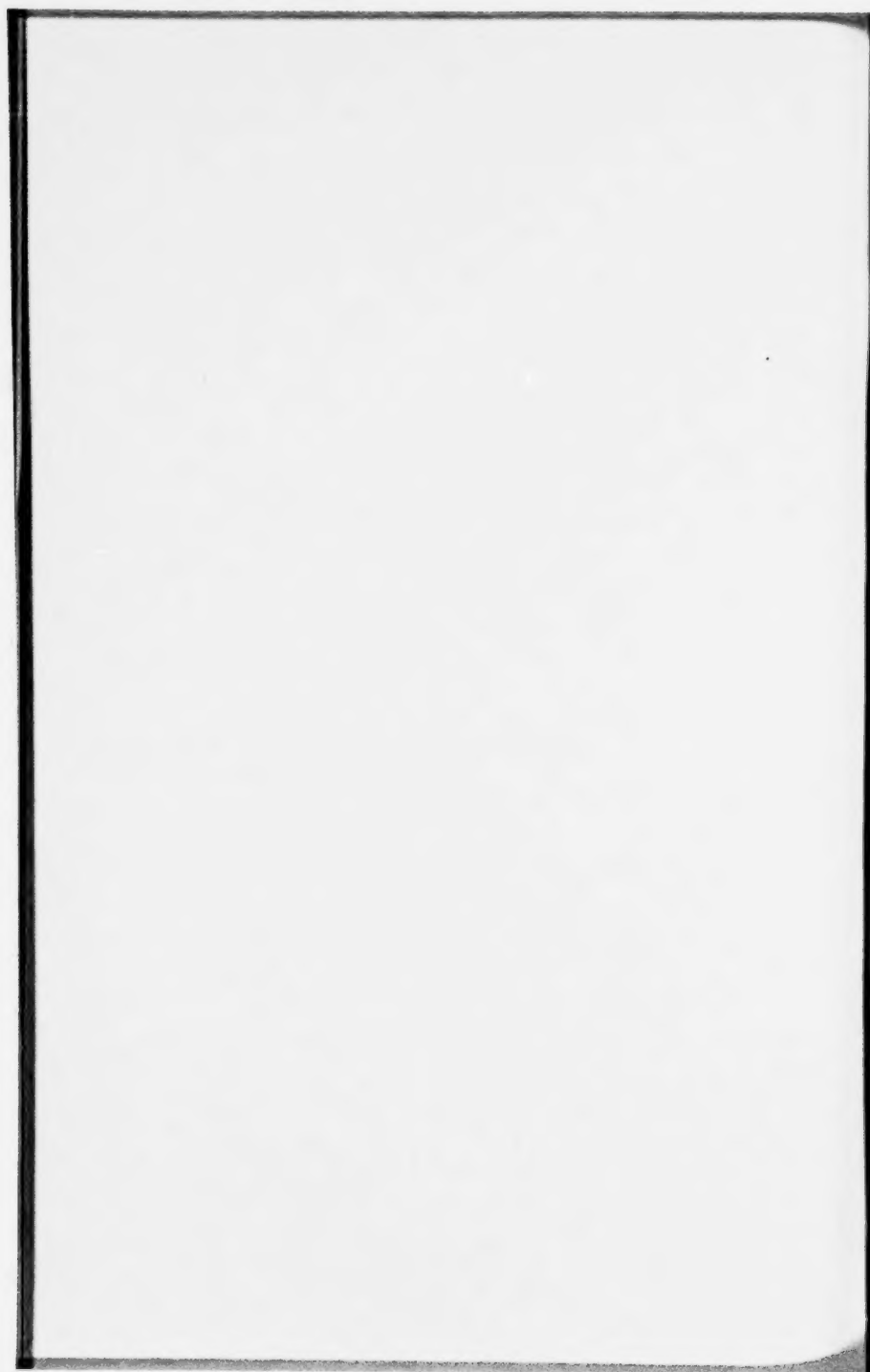
vs.

PATRICK J. CARR, County Treasurer and Ex
Officio County Collector of Cook County, Illi-
nois,
Defendant in Error.

REPLY OF PLAINTIFF IN ERROR TO PETITION FOR REHEARING.

CHARLES E. HUGHES,
CHARLES S. DENEEN,
ROBERT J. FOLONIE,
FREDERICK D. SILBER,

ATTORNEYS FOR PLAINTIFF IN ERROR.



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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1926.

HANOVER FIRE INSURANCE COMPANY,
Plaintiff in Error,

vs.

PATRICK J. CARR, County Treasurer and
Ex Officio County Collector of Cook
County, Illinois,

Defendant in Error.

REPLY OF PLAINTIFF IN ERROR TO PETITION
FOR REHEARING.

MAY IT PLEASE THE COURT:

The defendant in error has presented a petition for rehearing occupying 113 printed pages and embodying in various forms of statement a complete re-argument of the case.

Rule 30 of this Honorable Court, with respect to rehearings, provides that the petition for rehearing "must be printed, *briefly* and distinctly state its grounds, and be supported by a certificate of counsel," etc. The present petition for rehearing violates the foregoing rule.

The petition is a reiteration of the original brief on behalf of defendant in error and of some of the points made in the oral argument at this bar. There is no single point brought to the attention of the Court in the petition that has not already been considered and decided.

The chief premises of the petition for rehearing are (1) that the license granted to the plaintiff in error by the State

of Illinois was creative of a *contract*, and (2) that the tax exaction is a *license fee* exacted *under the police power* of the state and not a tax for revenue. Both questions have been fully argued, considered and decided.

The petition abounds in statements which have no ground in the record and exaggerated statements of the effect of the decision upon the tax laws of Illinois and other states. It is stated in the petition for rehearing that under this decision, "there will remain no law by which foreign fire insurance companies can be compelled to pay any taxes after their admission into the state." (Pet. Rhg. 2.) To the contrary, foreign insurance companies doing business in Illinois always have paid and, regardless of this decision, will have to pay taxes:

(a) State, county and municipal at going tax rates of about eight per cent upon all their property, "real and personal" in the State of Illinois; and "all moneys, credits, bonds or stocks and other investments, * * * held * * * by persons residing in this state."

Ill. Rev. St. Cahill (1925) Ch. 120, Sec. 1.

(b) An annual privilege tax of two per cent upon all of their gross premiums in the state for the past calendar year. (namely, upon the amount of the premiums without deduction for even their expenses, which are retained by the agent and never reach the treasury of the Company).

Ill. Rev. St. Cahill (1925) Ch. 73, Sec. 79.

(c) Fire department taxes to municipalities for the exercise of the privilege of doing business therein, amounting to two per cent of gross premiums.

Ill. Rev. St. Cahill (1925) Ch. 24, Sec. 1036.

(d) Taxes for support of fire patrols in cities for protection of property (insured or uninsured) amounting to two per cent of gross premiums.

Ill. Rev. St. Cahill. (1925) Ch. 142, Sec. 2.

(e) Tax of one-half of one per cent of their gross premiums in the state for the support of the fire marshal's department.

Ill. Rev. St. Cahill (1925) Ch. 73, Sec. 122.

And in addition, all of the annual license fees prescribed by Section 27 of the Act Governing Fire Insurance Companies.

Ill. Rev. St. Cahill (1925) Ch. 73, Sec. 156.

The premiums, so heavily burdened by Illinois, when reduced to possession are subject to tax in Illinois if on hand April 1st, and when transmitted to the home states of these companies, there become subject to the property taxes of such states. It cannot be questioned that the taxes paid in Illinois by fire insurance companies foreign to that state (exclusive of the tax under Section 30 here under consideration) are greater proportionately than are paid by any other class of property owners.

The statements in the petition that to impose any taxes upon foreign fire insurance companies in Illinois will require an amendment to the Constitution of that state is a manifest absurdity.

The petition for rehearing is fundamentally unsound in its confusion of two matters in their nature entirely distinct, namely:

(a) The exercise by a state of its police power to exclude foreign corporations or given classes of business from the state and burdening their admission by fees and payments virtually without limit;

(b) The exercise of taxing power by the state whereby burdens are imposed under that power for maintenance of the government. Such power is limited in its application to persons and property within the jurisdiction of the state,

and the obligation of the state in imposing such burdens is limited in that it may not unfairly and unreasonably discriminate between persons and property similarly situated.

Furthermore, our opponents stress the burdens which have been frequently justified when placed upon domestic corporations by their *charters*, urging that these decisions warrant the placing of burdens upon foreign licensed companies, regardless of equality of protection. They have confused the right to challenge a tax *in invitum* with cases wherein obligations were voluntarily assumed in charters.

A great number of statutes are referred to and set forth, all of which are asserted to come within the inhibition of this decision. Practically without exception, they fall outside the declarations of the Court in the instant case. The tax here under consideration differs materially from fees under such statutes in general in the following particulars:

1. The imposition here under review is a tax and not a license fee.
2. Its payment is not made a condition precedent to issuance of license.
3. It is not a levy of a specified percentage upon premiums, but is imposed by report of net receipts to tax officials, who spread the amount upon the tax records, whereby it becomes subject to going property tax rates.
4. The statute here under review does not impose the duty of the payment of tax upon the insurance company or upon the agent or any other person, but like property taxes generally, the tax follows the possession of the property wherever that may be lodged.
5. By the process of spreading them upon the assessment records, the net receipts become a part of the sum total of property, upon consideration of the value of the whole body of which the tax rate upon personal property is fixed.

6. Subjection to the tax does not arise by issuance of a license, but by virtue of the relation to the property to be taxed, namely, ownership or possession of net premiums.

7. No provision is made in the statute for collection or payment of the tax other than the provision that the amount when returned shall be spread upon the tax assessment records, whereby it presumably becomes subjected to the ordinary machinery for collection of taxes.

The petition for rehearing cites cases such as the *Palmetto* cases, involving statutory requirements for writing insurance through designated agents, etc. Whether such impositions are imposed before or after entry of the company into the state is of no materiality because they are regulations pursuant to the police power of the state. The tax here under consideration is not levied pursuant to the police power, but is clearly a tax for revenue, respecting which the equal protection clause of the Constitution may be invoked.

The petition for rehearing elaborates the point (also made in the original brief of defendant in error), that the provision of the Fourteenth Amendment, respecting equal protection of the laws, may not be invoked, as against arbitrary state action where it *involves only the taking of money*. It is contended that a distinction exists between such a case and one where right of access to the Federal Courts, etc., is involved. The Fourteenth Amendment is designed to protect property, as well as liberty, and money is property.

We shall hereinafter adopt the Roman numeral subdivisions used in the petition for rehearing in discussing the details of the matters in the petition.

I.

Under this point (Pet. Rhg. 3) the petitioner asserts that the state may, as a condition precedent to admitting a corporation into a state, impose license fees virtually at will.

The statute and the imposition imposed under it (as this Court has correctly found) do not impose the tax here in question as a license fee for entry into the state, but as a tax for revenue.

We call attention to the fact that under this point (Pet. Rhg. 4) the assumption is made throughout that the tax imposed upon the plaintiff in error is a sum which it *contracted* to pay. This assumption is unsound and will be discussed more in detail under the next following point.

II.

The essence of the second point made in the petition for rehearing (page 5 *et sequitur*) is that the license granted pursuant to Section 22 of the Act in question is a contract and the equivalent of a charter and that the corporation, while availing itself of the fruits of such contract, repudiates the consideration which, by such contract, it agreed to pay.

This entire assumption is unsound, as this Court has held in its opinion. The license to the plaintiff in error was not a contract such as may be made by a domestic corporation by its acceptance of a charter.

The unsoundness of the argument as made by the defendant in error is demonstrated by Judge Bigelow, speaking for the Supreme Court of Massachusetts, who says of a similar argument (*Calder v. Kurby*, 5 Gray 597):

"The whole argument of the counsel for the plaintiff is founded on a fallacy. A license under Revised Statutes c. 47, authorizing a person to retail spiritous and intoxicating liquors, does not create any contract between him and the government. It bears no resemblance to an act of incorporation by which, in consideration of the supposed benefit to the public, certain rights and privileges are granted by the legislature to individuals, under which they embark their skill, enterprise and capital. The statute regulating licensed houses has a very different scope and purpose. It was intended to restrain

and prohibit the indiscriminate sale of certain articles deemed to be injurious to the welfare of the community. The effect of a license was merely to permit a person to carry on a trade under certain regulations and to exempt him from the penalties provided for unlawful sales. It therefore contained none of the elements of a contract."

In the same case it is stated that the provisions for the issuance of a license are:

"a mere police regulation, intended to regulate trade, prevent injurious practices and promote the good order and welfare of the community, and liable to be modified and repealed whenever in the judgment of the legislature it failed to accomplish these objects." *Calder v. Kurby, supra.*

The grant of a license to a foreign fire insurance company to transact the business of insurance in the state is an exercise by the state of its police power. The legislature has no power, if it would, to limit its future exercise of the police power. Should the state determine to place further restrictions upon the business of insurance, or prohibit its conduct, its rights in these respects are measured only by the limits of its police powers. The limitations of such power are not the subject of contract. For this reason license to operate a slaughter house at a given location, or under specified conditions, is not creative of a contract.

City v. Cook, 48 Ore. 550.

9 L. R. A., N. S. 733.

The grant of license for operation of lotteries for which money had been paid, has been held not to prevent the repeal of the authority to conduct such business.

Boyd v. Alabama, 94 U. S. 645.

Stone v. Mississippi, 101 U. S. 814.

Douglas v. Kentucky, 168 U. S. 488.

Likewise the issuance of a license to manufacture or sell intoxicating liquors is not creative of a contract, but only operates to legalize the business while such business is permitted to continue.

Boston Beer Company v. Massachusetts, 97 U. S. 25.

In a case where a general assembly had authorized license for ferries and provided by the act that no other ferries should be permitted within one-half mile of a ferry licensed under the act, the state was not precluded by later legislation from permitting ferries within a lesser distance upon the theory that such change of the law was a violation of a contract. In such case, this Court, by Mr. Justice Brewer, say:

“This is an obvious error. The act of 1840 was one of general legislation, and subject to repeal by the general assembly. No rights could be created under that statute beyond its terms, and by it no restraint was placed upon legislative action (l. c. 602).”

The Court there further say:

“A contract binding the state is only created by clear language and is not to be extended by implication beyond the terms of the statute. (l. c. 603).” (*Williams v. Wingo*, 177 U. S. 601.)

There is nothing in the license of the plaintiff in error which would preclude the legislature from declaring a change of the public policy of the state and prohibiting the business of insurance altogether (assuming that this was a reasonable exercise of the police power), or in enacting a tax statute imposing greater or lesser taxes, providing that the constitutional requirements as to equal protection were observed.

If the position of the defendant in error were sound, then every general law under which licenses were issued, under the police power of the state, would, upon acceptance of license, be creative of a contract which the state could neither repeal nor supersede.

The adoption of such a theory into the law would be destructive of government, for it would estop the state from the exercise of its police power and from changing its public policy at its will.

The cases cited under Point II of the petition for rehearing are cases of contract in the strict and proper sense of that term. They consider provisions, either expressed in a charter which is a contract, or incorporated into the charter by reference, which is the same thing. The argument that a license issued under the police power is essentially the same thing as a corporate charter whereby grants are made to individuals (investing them with powers which, but for such charter, would be non-existent), is a basic error upon which the petition for rehearing rests.

The argument is made under this point that by this decision foreign corporations may invoke the provision of the Constitution as to equal protection of the laws, but that domestic corporations are precluded by their charter agreements, from so doing, whereby a grave injury is done to domestic corporations. It is unnecessary to enter upon the detail of this argument, for no domestic corporation is before the Court urging its rights, but the entity before the Court is a foreign corporation, and if it is denied the equal protection of the laws, its constitutional rights are infringed and it may complain.

This entire argument rests in hypothetical injury to some domestic corporation which might be compelled to pay what it contracted to pay; contrasted with a foreign corporation upon which a different burden is laid *in invitum* and complains because the exaction is unconstitutional. The contention is specious which seeks to place burdens *in invitum* by a tax law in the class of burdens which rest not upon the force of law, but upon the terms of voluntary contract.

III.

Under this division of the petition for rehearing (p. 14) the defendant in error asserts in effect that this Court may declare laws and exactions invalid when they infringe the due process clause of the Constitution or the commerce clause of the Constitution, but may not do so in cases where equal protection of the laws has been denied. It seems to us that a mere statement of the effect of this point is a complete answer to it.

The defendant in error has misconceived the spirit of the decisions of this Court, particularly wherein it is claimed that the decision in *Kas. M. & B. R. R. Co. v. Stiles*, 242 U. S. 111, and the case of *Air-Way Electric Appliance Corporation v. Day*, 266 U. S. 77 (69 L. Ed. 169) are in conflict one with the other. The present case falls within the ruling in the case of *Southern Railroad Company v. Greene*. The reason that the rule in the *Greene case* was not applied in the *Stiles case* is stated by the Court in its opinion in such case. The Court, referring to the *Greene case*, say:

“That case is readily distinguishable from the one now under consideration. Here the statute imposes the franchise tax *equally upon all* of its corporations, consolidated and otherwise.” (l. c. 118.)

If the tax in the case at bar were imposed *equally* upon all corporations doing a business of fire insurance in Illinois, the case would fall within the decision in the *Stiles case*. As it is not imposed equally, but in a most *discriminatory* and *arbitrary* manner, it falls within the other line of cases. We do not wish the Court to think that we are undertaking herein to answer all the baseless assertions in the petition for rehearing, for to do so would make this reply endless.

An example of such unfounded statements is found at page 19 of the petition for the rehearing where it is said:

“In other words, the Company, as compensation for the privilege, is required to give the state a share of the profits; not of its entire business, but of its business in Illinois which it carries on in pursuance of the privilege.”

The inferences created by this statement are false in that

- (a) The tax in question is one for revenue and not “compensation for the privilege.”
- (b) The tax is not levied upon profits, but upon net receipts which do not take into account losses. If, as frequently happens, the fire losses consume all the net premiums, a loss in the conduct of the business, and not a “profit,” would be the result.

The astounding claim is made in the petition for rehearing that a claim of violation of the equal protection clause of the Constitution is not available herein because such constitutional provision “is not applicable to the case of the imposition of a money burden.” (Pet. Rhg. 16.)

If this position were sound, it would mean that a state might confiscate all of the property of a foreign corporation and defend its action upon the ground that it had “only imposed a money burden.” As was said in the case of *Erie R. R. Company v. State*, 31 N. J. L. 542, where the Court of Errors and Appeals condemned the operation of a similar tax law: To support such contention “would obviously offer the entire property of a foreign corporation as a prize to the rapacity of any state in whose territory it might be.” Such a doctrine would prevent constitutional attack upon any tax law, for no tax law takes anything but money.

An equally untenable position is that of the defendant in error wherein it is asserted that “it would be a gross injury

if the state, by its legislation, should arbitrarily discriminate *between individuals* * * * imposing tax burdens upon some and not imposing them upon others similarly situated," (Pet. Rhg. 23) but contending that such arbitrary discrimination may be had as against foreign corporations. Counsel for defendant in error by this argument have exposed their real position which is that arbitrary discrimination without limit is warrantable and justifiable against foreign corporations, and that they have no constitutional rights which the law may protect.

IV.

The caption to this point (Pet. Rhg. 26) is as confusing as the subject matter discussed under it. The caption assumes that the tax here under consideration is "a condition" and that it is imposed as a condition *precedent* to doing business in the state. The imposition is spoken of in the caption as "a greater tax," but is discussed throughout as if it were a *license fee*. The tax is stated to be "a compensation for grant of its franchise"; whereas, it is a tax for revenue, not compensation for anything, nor was plaintiff in error the recipient of a franchise. Under this point the language of this Court is misconstrued and the argument based on such misconception. The defendant in error says of this Court's opinion (Pet. Rhg. 27) "As we construe this language, it is based upon the assumption that the instant case is one in which there has been an attempt to vary the terms of the original license." This Court has not weighed the terms of the original license, but has taken the position that license having issued, the plaintiff in error was from that time when it was so legalized, entitled to the equal protection of the laws.

The assumption is made throughout this point that the taxes payable under Section 30 are by statute made a condition precedent to entry into the state. The decision of the Supreme Court of Illinois in the case at bar holds to the

contrary, and concedes that it is not made a condition precedent to entry into the state, and further states that legal rules do "*not necessarily require* that it be paid as a condition precedent." (Tr. 50.)

Under this point the defendant in error proceeds upon the assumption that all that the plaintiff in error has in Illinois is a good will. It has more than that. It has an established business and a property right exists in an established business. This Court has in its opinion recited the nature and incidents of this established business. Courts of equity in injunction cases have always recognized that interference with an established business is an invasion of property rights distinguished from threats or interference with a business not established. (*Denver v. Denver Water Co.*, 246 U. S. 178.) There is a marked distinction between the power of states to destroy a business which has been established by its sanction, and prohibit one who has never engaged in the pursuit from entering into it. It is upon such considerations that distinctions are drawn in the law, between one who is at the threshold seeking admittance and one who is already in the state engaged in pursuing legalized activities. There is no reason in principle why a distinction should be drawn in such a case between the destruction of physical property by the taxing power of the state and the destruction of intangible property whose value may be much greater. Property rights should be sacred under constitutional guarantee regardless of the precise nature of the property affected.

Under this point the defendant in error asserts that prior to the tax year in question the Supreme Court of Illinois had in the case of *People, ex rel. v. Kent*, declared that in the future it would construe Section 30 to authorize tax officers to place upon foreign insurance companies burdens which this Court declares to be unconstitutional. (We have pointed out that the decree expressly finds otherwise—Reply Brief for Plaintiff in Error 23, 24.)

The argument is made that if the state notified foreign companies that it might thereafter violate the Constitution and if after such notification the companies entered the state, they could not question the constitutionality of a tax if and when thereafter imposed. If the tax imposed upon the plaintiff in error in 1922 is unconstitutional, can a statement by the Supreme Court of Illinois, prior to the tax year, that its tax officers would in future years not be bound by the Federal Constitution, deprive one who is thereafter injured by an unconstitutional application of law from contesting the tax? Surely such a situation is not stronger against the insurance company than if an express agreement had been exacted from it when it entered the state, stating in substance, "If we are admitted into the State of Illinois, we will submit to any taxes the State may impose upon us and will in no case complain if our rights under the Federal Constitution are infringed." Had such a statement been exacted from the plaintiff in error as a condition of admission to the state, it would have been a void writing and surely declarations by the Court in a suit for mandamus to which the plaintiff in error was not a party; which was not a suit for collection of taxes; in which constitutional questions could not be raised; cannot be superior to such a void agreement as we have assumed herein.

V.

Nothing new is presented under this point. (Pet. Rhg. 35.) We call attention to the fact that the case of *People v. Thurber*, 13 Ill. 554, cited at page 37 was not a case under the statute here for consideration, nor did it involve a tax *in invitum*, but a license fee required to be paid by agents as a condition of issuance of their license.

VI.

The point is made in the petition for rehearing (Pet. Rhg. 43) that there is no discrimination by virtue of the statute and the tax imposition here under consideration. The Act has discrimination for its object and it is written into its every line. It provides that the tax shall be paid only by *foreign fire insurance companies*. Domestic fire insurance companies are excluded from the tax. Casualty companies, both domestic and foreign, are relieved from tax upon the same classes of business upon which plaintiff in error is taxed.

It is urged, however, that some measure of equality of protection exists by the fact that domestic fire insurance companies must pay a capital stock tax. We deny that the burdens of such a tax may be weighed comparatively with the discriminatory tax here under consideration. But assuming comparison would be proper, we discuss the matter as briefly as the subject permits.

The contention that the burdens of Section 30 serve to create equality of burden between foreign companies and domestic companies because the latter must pay a capital stock tax, is a contention not even mentioned when this case was pending in the Courts of Illinois. Doubtless, this was not urged in Illinois for lack of temerity because the Supreme Court of that state has repeatedly declared and stated that the capital stock tax is a property tax and nothing else.

It is to be noted that the defendant in error has not set forth the provisions of this capital stock tax statute in any place in its briefs or argument. Confusion might well exist on the part of this Court in the absence of explanation. We therefore give the substance of the property tax laws of Illinois, italicizing the portions relating to capital stock tax for the Court's convenience in finding them.

By Chapter 120, Illinois Revised Statutes, Cahill (1925) title "Revenue," it is provided (Sec. 1):

"That the property named in this section shall be assessed and taxed except so much thereof as may be in this act exempted:

First—All real and personal property in this state.

Second—All moneys, credits, bonds or stocks and other investments, the shares of the stock of unincorporated companies and associations, and all other personal property, including property *in transitu* to or from this state, used, held, owned or controlled by persons residing in this state.

Third—The shares of capital stock of banks and banking companies doing business in this state.

Fourth—*The capital stock of companies and associations incorporated under the laws of this state, except," etc.*

(Note: The insurance companies, both foreign and domestic, must pay taxes upon property mentioned under the first and second subdivisions; neither is comprehended under the third subdivision, and only domestic companies fall under the fourth subdivision (explanation hereinafter).)

By Section 3, the valuation of personal property is provided as follows:

"Personal property shall be valued as follows:

First: All personal property * * * at its fair cash value;

Second: Every credit * * * shall be valued at a fair cash value * * *.

Third: Annuities and royalties shall be valued at their then present value;

Fourth: *The capital stock of all companies, and associations now or hereafter created under the laws of this State * * * shall be so valued by the State Board of Equalization as to ascertain and determine respectively the fair cash value of such capital stock, including the franchise, over and above the assessed value of the tang-*

*ible property of such company * * * provided that in all cases where the tangible property or capital stock of any company or association is assessed under this Act, the shares of capital stock of such company or association shall not be assessed or taxed in this State."*

By Section 13 of such Act, it is provided that "the personal property of * * * insurance companies * * * shall be listed * * * where their business is carried on."

By Section 26, listing of property is prescribed which, in addition to recital of various tangible property, requires listing of "(14th) every franchise, the description and the value thereof; (27th) the amount of credits; (29th) the amount and value of shares of capital stock of companies and associations not incorporated by the laws of this state."

(Note: The effect of these requirements is to require listing of all franchises employed or held, and requires the listing for taxation of the capital stock of foreign fire insurance companies held in Illinois but not the listing of the shares of stock of domestic companies, which are exempt from taxation against the shareholder.)

Section 28 requires listing of credits, permitting deduction of debts therefrom.

Section 37 provides that "insurance * * * companies * * * incorporated under the laws of this state, shall list * * * (4th) *the market value, or if no market value, then the actual value of the shares of stock*; (5th) the total amount of all indebtedness, except the indebtedness for current expenses; (6th) the assessed valuation of all its tangible property."

By Section 38, such statements of the insurance companies are sent to the State Tax Commission by the Assessor, which body is required to "value and assess the capital stock of such companies or associations in the manner provided in this act."

Section 39 provides: "Every person, owning or using a franchise granted by any law in this state shall, in addition to other property, list the same as personal property, giving the total value thereof."

The capital stock tax is one upon the property of the corporation, which, being all taxed, its stockholders are exempted from all taxes upon the stock of such corporation.

Consolidated Coal Co. v. Miller, 236 Ill. 149.

People v. Federal Security Company, 255 Ill. 561.

The tangible property of the domestic company is taxed the same as that of any other property owners and all the value of such property, real and personal, is deductible before assessment of tax under the capital stock tax statute. The result is that the capital stock tax is paid only upon the *excess of the value of the corporation's property above its tangible taxable property*. *Porter v. Railroad Co.*, 76 Ill. 561. The capital stock tax is "intended to designate thereby the property of the corporation." (p. 568.) By capital stock is meant the fair cash value of all the stock of the corporation. (l. c. 587.) From such total is to be deducted the aggregate value of all tangible property. (l. c. 587.)

The characteristics of the capital stock tax have received construction repeatedly by the Courts of Illinois. In the case of the *Hub v. Hamberg*, 211 Ill. 43, a bill was filed to enjoin collection of capital stock tax, and it was contended that it bore unequally upon domestic corporations because "It is urged that the assessment of capital stock is an assessment that cannot be made against individuals." (l. c. 51.) It was contended this made the tax subject to attack as unconstitutional and violative of the uniformity provisions of the Constitution of the State of Illinois. The Court say (l. c. 52): "We have expressly held that the tax authorized by this paragraph, upon capital stock and franchise, is a tax upon property and not a tax upon an occupation. (*Sterling Gas Com-*

pany v. Higbee, 134 Ill. 557; *Raymond v. Hartford Fire Insurance Company*, 196 Ill. 329).” The Court holds there is no disparity because all persons in the state are taxed upon all their property, and says: “The law requires the assessment of *all property* of the individual; the capital stock tax is a property tax; consequently, the assessment of *all of the property* of the corporation must cover the capital stock, including the franchise.” (l. c. 53.) It is held that there is no inequality of tax, for every person in the state is taxed upon all of his property, real and personal, and the taxation of the capital stock, inclusive of the franchise of a domestic corporation, accomplishes nothing more than to tax all of its property in the state. Upon such considerations it is held that there is no violation of the rule of uniformity.

This Court has had the capital stock tax law of Illinois before it in the *State Railroad Tax Cases*, 92 U. S. 575, and this Court has summarized the nature of such tax in the following statement:

“The system adopted by the statute of Illinois and the rule of the Board of Equalization preserve this principle of taxing all the tangible property at its value and taxing the capital stock and franchise at their value, if there be any, after deducting the value of the tangible property.” (l. c. 605.)

Such system is the identical one of which the defendant in error here seeks to make capital. This Court say in the same case that the application of the capital stock tax to tax values, if any, in cases of tangible property, has such effect that thereby is “ascertained the true value of the road, of its property, its capital stock and its franchises, for these are all represented by the value of its bonded debt and of the shares of its capital stock.” (l. c. 605.) It is important to note that the capital stock tax is applied only to such value of corporate assets, if any, as exceeds the value of tangible

property which is first taxed, and this Court say of that procedure:

“If taxes were assessable alone on the value of the capital stock and franchise of the corporation, cases might be found where these were worth nothing and such companies would pay no tax, even for their real estate and personal property.” (l. c. 605.)

The Supreme Court of Illinois has stated the method of assessing capital stock tax as follows: “The mode of finding the share of the ‘capital stock’ to be taxed is to take the value of all property, tangible and intangible, real, personal or mixed, including the franchise granted by the State, and deduct from it the value of the tangible property to avoid double taxation.” (*Illinois Central Railroad Company v. Carr*, 302 Ill. 172; l. c. 179.)

In the case of *National Reserve Insurance Company v. Ship-ton*, 314 Ill. 472, wherein a bill to enjoin certain taxes was sustained, the Court in the course of its opinion states the nature of capital stock tax as follows: (A. D. 1924):

“It was decided in *Porter v. Rockford, Rock Island & St. Louis Ry. Company*, 76 Ill. 561, that ‘capital stock’ as intended by the Revenue Act did not mean shares of stock, either separately or in the aggregate, but meant the property of the corporation, and that decision has been repeatedly approved and adhered to.”

As foreign fire insurance companies are required to pay tax upon all of their *property of every kind* in the State of Illinois, and as the capital stock tax is a tax upon property of domestic companies, each therefore pays under the Revenue Law of Illinois upon all of the property it has in the State of Illinois. It is true that domestic companies, particularly public utilities, commonly have franchises, which foreign corporations have not. They are a part of their property within that state. Foreign corporations having franchises issued by the state of their domicile will be taxed upon their franchises

in those states. The matter may be summed up that domestic fire insurance companies pay taxes upon *all of their property* (which includes their franchise) and foreign insurance companies also pay taxes upon *all of their property* in the State of Illinois. If one has more property, or property of a different kind in the state than the other, the fact that their taxes differ for this reason has no tendency whatever to create inequality of tax burden. The capital stock provisions of Illinois tax a domestic company upon nothing except its property. If it could be held to be in any sense a privilege tax (because their franchise is taxed, out of which their privilege arises), this is much more than offset by the provisions of the Privilege Tax Law resting upon foreign fire insurance companies and not upon domestic companies. By that payment they pay for so much of their franchise value as is used in Illinois and the tax burden is thus equalized.

Domestic fire insurance companies in Illinois must of necessity fall into the class of corporations before the Court in the case of *Calumet Dock Co. v. Stuckart*, 275 Ill. 253, wherein the corporation was held free from capital stock tax because "*the aggregate value of the capital stock was less than the aggregate value of the tangible property of the corporation. There was, therefore, no basis for an assessment of capital stock.*" (l. c. 254.) Fire insurance companies must always have tangible property in the aggregate more than the aggregate value of their capital stock, because they are required by law to have their capital intact and invested in property of such character that it will pass scrutiny as "admitted assets."

In other words, the capital must be intact in securities or property of highest grade. (Ill. Rev. St., Cahill (1925), Ch. 73, Sec. 136.) In addition to the property representative of capital and surplus which are the unqualified property of the corporation and present in form of tangible property, they must also have tangible property representative of their

unearned premium reserves provided for by the laws of all states, including Illinois. (Ill. Rev. St., Cahill (1925), Ch. 73, Sec. 140.) This unearned premium reserve is money collected in advance from policyholders for the furnishing of future indemnity. It is subject, in whole or in part, to future payments of losses from the hazards insured against. The property of the company entering into the value of its capital stock must necessarily be less than its taxable tangibles. The investments which provide for these reserves are present as tangible property and are subject to tax as property. This property enters only in part, if at all, into net values enhancing the capital stock value for the greater part will be paid out in losses. It has been repeatedly held that assets representing such reserves may not be deducted from return of taxable property for assessment of property taxes.

State of N. J. v. Parker, 35 N. J. L. 575.

People, ex rel. v. Trustees of Westchester, 91 N. Y. 574.

Ins. Co. v. Capellar, 38 O. St. 560.

People v. Feitner, 166 N. Y. 129.

No fire insurance company, domestic to the State of Illinois, can be required under the terms of the law, to pay any substantial capital stock tax.

Even if domestic companies should pay a substantial capital stock tax, this would be more than offset by the privilege tax imposed upon foreign fire insurance companies by which they are required to pay two per cent (2%) upon all of their gross premiums on business done in the State of Illinois. This two per cent (2%) upon gross premiums means a payment of that percentage upon a sum which never in its entirety comes into the hands of the insurance companies because the commissions and expenses are deducted by the agent before it is remitted. The tax is paid, therefore, not only upon

the amount which the corporation reduces to possession, but also upon a large proportion which it never receives at all. The sum is paid upon the receipts, regardless of the losses which may more than consume the entire receipts. The sum is also paid, regardless of the property which may be on hand upon a given tax date. When it is considered that foreign corporations are also required to pay fire department tax, fire patrol tax, fire marshal tax, and license fees, and in addition must pay going tax rates upon *all their property* in the state, their taxes are so tremendously beyond anything which domestic corporations must pay that, (discarding the provisions of Section 30 entirely from consideration), the burdens upon foreign insurance companies are many times those which rest upon a like domestic company.

We wish to especially deny the unfounded assertions of the defendant in error (Petr. Rhg. p. 47) that plaintiff in error and other foreign fire insurance companies in their attitude toward tax obligations to Illinois "pay or not, as they see fit."

We call attention to the additional fact that the domestic corporation having paid taxes upon its property *its stockholders are exempted from tax upon their stock*. The tax is therefore carefully limited to a single tax upon the corporate assets. In the case of foreign corporations, however, all their property in the State of Illinois is taxed against the corporation and the stockholder must pay tax again upon his stock in such corporation. As the tax ultimately rests upon the stockholders, it thus appears that stockholders of foreign corporations pay double the tax which stockholders in domestic corporations bear. To assert that the capital stock tax burdens domestic corporations comparatively with the tax burdens of foreign insurance companies, will not bear analysis.

The net effect of the foregoing considerations is that

(1) The capital stock tax accomplishes no more than compulsion to pay taxes upon all property in the state.

(2) Foreign insurance companies also are required to pay taxes upon all property they have in the state.

(3) The nature of the business of fire insurance is such that tangible property of domestic companies subject to tax must of necessity exceed the whole value of the net worth of the company. There can therefore be no capital stock tax assessed against any domestic company which returns its tangible assets for taxation.

(4) The exemption of the stock of domestic corporations from tax makes the tax burden of its owners less than that of shareholders of foreign corporations.

(5) Neither domestic nor foreign insurance companies have franchises subject to tax under the capital stock tax law. If it were otherwise and domestic companies were taxed upon a franchise they in fact had, foreign companies also are subject to tax upon their franchise *if they have one* within the jurisdiction of Illinois.

VII.

Under this point (Pet. Rehg. p. 62) there is a mixture of the familiar claims of defendant in error that the tax under Section 30 is a *contract* obligation, that the tax payment is, in truth, a *license fee* for privilege; that because an equivalent amount *could have been* exacted as a condition of license, therefore, this tax for revenue cannot be attacked because the amount of such tax is not greater than the state could have exacted for license fees. As the state is virtually uncontrolled in its exactions for license fees, this argument is tantamount to a declaration that as the state has unlimited power respecting exactions for license fees, that it has like unquali-

fied power to exact any sum as taxes for revenue it may see fit, no matter how arbitrary or how unequally they bear upon property within the state.

VIII.

The caption to this point summarizes the argument under it. (Petr. Reh. p. 66.) The petition for rehearing states that a foreign company "secures its admission into the State of Illinois by the Act of 1869." The inference is sought to be left that insurance companies secure their admission pursuant to the provisions of *Section 30*, under which this tax was laid. In truth, the companies gain their admission to the state by their compliance with *Section 22* of the Act of March 11, 1869, (see Appendix to Original Brief for Plaintiff in Error, p. 84) upon compliance with the terms of which there must be a further compliance by payment of fees as provided by *Section 27* (Brief of Plaintiff in Error, p. 92). To remain in the state they must further pay the tax provided by the Privilege Act of 1919 (Brief of Plaintiff in Error, p. 99), and if they fail to pay that fee, their license will be revoked, pursuant to the twelfth section of that Act (Brief of Plaintiff in Error, p. 101). No one of these enactments makes payments under *Section 30* a condition for entry into or continuing in business in the State of Illinois.

The concluding portion of the caption to this point states that "the adoption of the Act of 1919 cannot be availed of to impair the obligation of *Section 30* of the Act of 1869." This presents a specious argument, for no one has contended that it impaired any obligations; to the contrary, it is expressly provided in such Act that it shall in no way affect or be dependent upon *Section 30*. They are two entirely independent enactments, the Act of 1919 fixing an obligation for *privilege* resting upon all foreign insurance corporations, casualty companies, fire companies, etc.; whereas, *Section 30* is a provision for a tax for revenue, resting upon foreign fire insurance companies only.

IX.

This point (Petr. Rehg. p. 70) is a re-argument of the same subject matter presented in the original brief of the defendant in error. In the first place, the Supreme Court of Illinois did not hold that the provisions of Section 30 were by law a condition precedent, but in substance holds the contrary. Substantially the same cases are cited and the same argument made upon which the Court has already passed. The only addition to former briefs lies in the citation of *Palmetto Fire Insurance Company cases* (Petr. Rehg. p. 76-78). The question involved in those cases was the police power of the state to compel insurance contracts to be written through resident agents. The question of taxes was not involved in the cases. It is true that the proposition of compelling the writing of policies through resident agents, had as one purpose to subject the premiums to the state license fees or privilege taxes, but the question involved was the bare issue as to the police power of the state to compel policies to be written through domestic agents. Such question has no bearing upon the issue here, in a case wherein the exercise of the police power has been exhausted by admitting a foreign corporation into the state and defining the conditions of compliance for entry. The question is whether or not the state may impose an unconstitutional tax for revenue upon such corporation which is lawfully within the state. In such case, the question of police power is foreign to the inquiry.

(Intervening points to Point XIII have been sufficiently noted in prior arguments and require no further discussion.)

XIII.

The defendant in error under this point (Petr. Rehg. p. 87) argues that the decision in the instant case will operate to invalidate the tax laws of many states which are partially set

forth under this point. These laws are so variant one from the other that it would be burdensome, and we believe a useless task to analyze them. In general it may be stated that they are, in strictness, license fees or taxes like the Privilege Act of 1919 in Illinois, and not taxes for revenue as is the tax here under consideration.

The statutes of other states set forth in general are not taxes *in invitum* to which foreign companies are subjected and domestic companies exempted. Neither do the statutes provide for the incorporation of them into the body of taxable property by return to taxing officials and entry of them upon the tax records. Nor do any of such statutes cast the tremendously unequal burden of taxes upon the foreign companies, which are done by the law and the tax here under consideration.

In all of the tax laws cited, the provision is for a percentage upon premiums in a fixed amount and not application of going tax rate, and in general, they are privilege or license fees, and not taxes for revenue imposed upon some companies, from which others in the same situation are exempted.

Examination of the statutes cited, as set forth in the petition for rehearing leaves the argument of the defendant in error unconvincing. The defendant in error concedes the invalidity of the argument so presented in the petition for rehearing when it states that if the tax here complained of violates the equal protection clause "it must be overthrown, no matter how many other state laws go with it."

In truth, this whole argument is an effort to create a fear in this court that its decision will serve as a lever by which to upset laws of many states. The fears which the defendant in error conjures are not at all formidable, and are expressed only in the vain hope that they will cause this Court, by consideration of extraneous circumstances, to depart from its obligations to decide the instant case upon the record before it.

No cause for rehearing is presented and the petition for rehearing ought to be overruled.

Respectfully submitted,

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NO. [REDACTED] 179

OCT 2 1925

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1925.

HANOVER FIRE INSURANCE COMPANY,
Plaintiff in Error,

vs.

PATRICK J. CARR, County Treasurer and Ex Officio County
Collector of Cook County, Illinois.
Defendant in Error.

ERROR TO THE SUPREME COURT OF ILLINOIS.

Brief for Defendant in Error in Reply on
Motion to Affirm.

FRANCIS X. BUSCH,

LEON HORNSTEIN,

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IN THE
Supreme Court of the United States,

OCTOBER TERM, A. D. 1925.

No. 626.

HANOVER FIRE INSURANCE COMPANY,

Plaintiff in Error,

vs.

**PATRICK J. CARR, County Treasurer and Ex Officio County
Collector of Cook County, Illinois,**

Defendant in Error.

ERROR TO THE SUPREME COURT OF ILLINOIS.

**BRIEF FOR DEFENDANT IN ERROR IN REPLY ON
MOTION TO AFFIRM.**

Plaintiff in error bases its argument that Section 30 of the Act of 1869 violates the Fourteenth Amendment upon two propositions. First, it asserts that the tax in question is a tax on property, and second it asserts that because it is a tax upon property it is illegal. We will briefly examine those propositions.

I.

**THE PROPOSITION THAT THE TAX PROVIDED
FOR BY SECTION 30 OF THE ACT OF 1869 IS A
PROPERTY TAX.**

Whether, as contended by plaintiff in error, the characterization by the Supreme Court of Illinois of the tax

provided for by Section 30 of the Act of 1869 as a privilege tax is not binding upon this court is immaterial. Its construction of that section is binding. See *St. Louis Cotton Compress Company v. Arkansas*, 260 U. S. 346, cited by defendant in error (Brief p. 8) and numerous other cases.

Hence the decision of the Illinois Supreme Court that the net receipts of the insurance company are not subject to valuation or assessment, but that the tax is computed upon the full amount of the net receipts is binding.

Hanover Fire Insurance Company v. Carr, 317 Ill. 366.

So we have a decision binding upon this court that the statute means that the foreign insurance is to pay to the state and to its various municipalities annually a sum determined by applying the tax rate to the full amount of the net receipts.

Now what is this payment made for? The Supreme Court of Illinois says it is made "as compensation for the right to do business in the state and in such municipalities."

In so holding it reaffirms its previous decision in *People v. Kent*, 300 Ill. 324, cited in our brief (p. 4) which in turn reaffirmed the previous decision of the court made in 1852 in the case of *People v. Thurber*, 13 Ill. 555. In that case the court had before it a statute by which every agent of a foreign insurance company was required "to pay over to the clerk of the county commissioners' court 3 per cent on the amount of premiums charged by him on all policies by him issued." In upholding that statute the court said:

"This is not a tax upon property, but is a burden imposed upon the agent for the right of exercising a franchise or privilege, and which the Legislature would have the right to withhold or inhibit alto-

gether, and the amount of premiums charged is merely used as a mode of computing the amount to be paid for the exercise of the privilege. The Legislature might have adopted, as a mode of computing the amount, the value of the property insured, and, in that event, it could hardly be said to be a tax upon that property; or the mode of computation might have been the number of policies issued or risks taken, without regard to the premiums charged, and then what would the tax have been upon? It will be observed that the law in question only applies to agents of foreign insurance companies; and it would be strange indeed if the Legislature had not the power to prescribe the terms upon which foreign corporations should be permitted to come into this state and carry on their business, or even to prohibit them altogether. If not, then the power of our Legislature to withhold charters of incorporation is but a shadow. Prudent legislation on their part will result in no substantial protection to the people. If foreign, and perhaps irresponsible, corporations may force themselves upon us in defiance of our laws, state sovereignty is but a name. If foreign insurance companies may establish their agencies all over the state in spite of her sovereign power, then foreign banks may do the same; and where will this new doctrine end, short of an utter prostration of all power in the state to protect her own citizens?"

The only difference between that statute and Section 30 of the Act of 1869 is that in the former statute the rate of payment is fixed at 3 per cent while in Section 30 of the Act of 1869 it is fixed at the annual tax rate which is to be determined from time to time by the proper officers.

II.

THE PROPOSITION THAT BECAUSE THE TAX PROVIDED FOR BY SECTION 30 OF THE ACT OF 1869, AS CONTENTED BY PLAINTIFF IN ERROR, IS A PROPERTY TAX IT IS ILLEGAL.

Suppose the Supreme Court of Illinois is wrong in holding the tax not to be a property tax. What difference does that make?

The provision for the tax is embodied in the very act which authorizes foreign insurance companies to transact business within the State of Illinois. Can the foreign insurance company accept the portion of the act which authorizes it to transact business in the state and reject the portion which imposes a tax upon it?

Suppose a statute granting to a foreign insurance company the privilege of transacting business in the state should contain a provision requiring it to pay twice as great a rate of taxation upon its property as a domestic company was required to pay. Could the foreign company come into the state and then escape taxation altogether on the ground it was taxed at a higher rate than other corporations? Of course not.

The power to exclude foreign corporations altogether necessarily includes the power to dictate the terms of their admission, and those terms may be subjection to a method of taxation entirely different from that imposed upon domestic companies.

The plaintiff in error came into the state with full notice of what it would be required to pay by way of taxation if it did come. It exercised the privilege granted. It should pay for it what it impliedly agreed to pay, and not insist that it must be free from all taxation while domestic companies must pay taxes on all their property.

III.

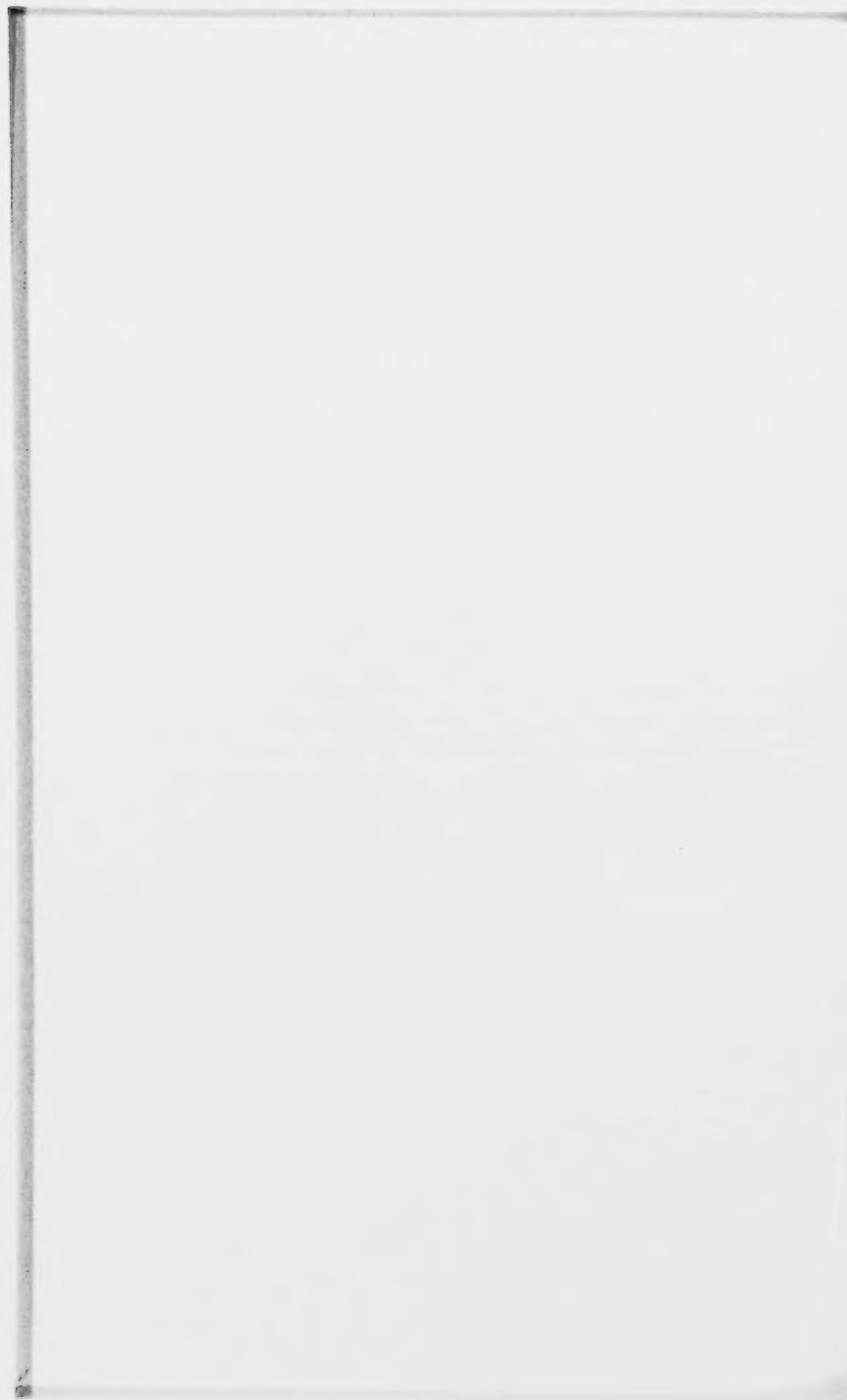
CONCLUSION.

The brief of plaintiff in error concludes with the following:

"This court need not find us to be right in order to deny the motion. It need only find that the questions are open to review and the position taken by us has merit."

This is, in effect, a plea for delay, delay which, we respectfully submit, is entirely unnecessary. There is no occasion, we submit, for further argument upon the questions raised, for nothing would be accomplished thereby excepting a year or more of delay in the collection of taxes from foreign insurance companies.

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POSTPONED TO MERITS

DEC 7 - 1925

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179

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1925.

HANOVER FIRE INSURANCE COMPANY,

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Collector of Cook County, Illinois.

Defendant in Error.

ERROR TO THE SUPREME COURT OF ILLINOIS.

Motion by Defendant in Error to affirm and
Brief in support thereof.

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IN THE
Supreme Court of the United States,

OCTOBER TERM, A. D. 1925.

No. 625.

HANOVER FIRE INSURANCE COMPANY,

Plaintiff in Error,

vs.

**PATRICK J. CARR, County Treasurer and Ex Officio County
Collector of Cook County, Illinois,**

Defendant in Error.

ERROR TO THE SUPREME COURT OF ILLINOIS.

**MOTION BY DEFENDANT IN ERROR TO AFFIRM
AND BRIEF IN SUPPORT THEREOF.**

And now comes Patrick J. Carr, County Treasurer and County Collector of Cook County, Illinois, Defendant in Error in the above entitled cause, and moves the court to affirm the judgment of the Supreme Court of Illinois therein on the ground that the writ of error in this cause was taken for delay only and that the questions on which the decision of this cause depend are so frivolous as not to need further argument.

LEON HORNSTEIN,

HIRAM T. GILBERT,

CLAIR E. MORE,

C. PAUL TALLMADGE,

Attorneys for Defendant in Error.

STATEMENT OF THE CASE.

The plaintiff in Error, Hanover Fire Insurance Company, is an insurance company organized under the laws of the State of New York. During the year commencing May 1, 1922, and ending April 30, 1923, it engaged in Chicago, in the State of Illinois, in the fire, marine and inland navigation insurance business, which it was permitted to do by a certificate of authority which it secured by compliance with Section 22 of an act of the General Assembly of that State entitled "An Act to incorporate and govern fire, marine and inland navigation insurance companies doing business in the State of Illinois," in force July 1, 1869, (Laws of 1869, p. 209) as amended by subsequent acts. In accordance with Section 30 of the same act an annual tax was imposed upon the net receipts of every foreign fire insurance company carrying on business in Illinois, while Illinois corporations doing the same kind of business were not subject to any such tax.

Claiming that the tax thus imposed for the year 1923 was illegal for the reason, among others, that it was an unlawful discrimination against foreign fire insurance corporations and in favor of domestic corporations and foreign casualty insurance companies, plaintiff in error filed its bill in equity against the defendant in error, Patrick J. Carr, County Treasurer and County Collector of Cook County, Illinois, in the Superior Court of that county to enjoin its collection. Denied relief in that court, it appealed to the Supreme Court of the State which affirmed the decree of the Superior Court.

Hanover Fire Insurance Company v. Carr, 317 Ill. 366.

By this writ of error it now seeks a reversal of the decision of the State Supreme Court on the ground that Section 30 of the act in question is in violation of the Fourteenth Amendment to the Constitution of the United States.

The points insisted upon by plaintiff in error in the court below, and which we assume will be insisted upon here, require a consideration of portions of the following laws of Illinois which are set forth in full in the Appendix hereto (*Post*, pp. 25-45.)

An Act entitled "*An Act to incorporate and govern fire, marine and inland navigation insurance companies doing business in the State of Illinois*," in force July 1, 1869, (Laws of 1869, p. 209), as amended by subsequent acts (Laws of 1879, p. 179, p. 246; Laws of 1881, p. 99; Laws of 1885, p. 209; Laws of 1889, p. 246; Laws of 1899, p. 176, 246; Laws of 1905, p. 290; Laws of 1912, p. 45, and Laws of 1919, p. 613). (*Post*, pp. 25-33.)

An Act entitled "*An Act for the assessment of property and for the levy and collection of taxes*," in force July 1, 1872, (Laws of 1871-2, p. 1), as amended by subsequent acts. (*Post*, pp. 33-35.)

An Act entitled "*An Act concerning the business of casualty insurance*," in force July 1, 1899, (Laws of 1899, pp. 288, 601), as amended by a subsequent act. (Laws of 1921, p. 473.) (*Post*, pp. 36-39.)

An Act entitled "*An Act in relation to the taxation of non-resident corporations, companies and associations for the privilege of doing an insurance business in this State*," in force July 1, 1919. (Laws of 1919, p. 622.) (*Post*, pp. 39-45.)

From the time of the adoption of the Act of 1869 down to 1920 foreign fire, marine and inland navigation insurance companies submitted to taxation under said Section 30 without questioning its validity and it was treated as valid by the Supreme Court of Illinois.

Walker v. City of Springfield, 94 Ill. 364.

City of Chicago v. Phoenix Insurance Co., 126 Ill. 276.

National Fire Insurance Co. v. Hanberg, 215 Ill. 378.

People v. Cosmopolitan Fire Insurance Co., 246 Ill. 442.

In 1920 and subsequently its validity was questioned by counsel representing insurance companies appearing as *amici curiae* in two cases, in neither of which the insurance companies were parties, and it was held to be valid.

People v. Kent, 300 Ill. 324, 328.

People v. Barrett, 309 Ill. 53, 63.

Thereupon the present suit was brought by the plaintiff in error for the express purpose of having it declared invalid, but the Supreme Court of Illinois adhered to their former decisions and sustained it.

Hanover Insurance Co. v. Carr, 317 Ill. 366.

It is to reverse the decision in the latter case that the present writ of error is brought. The contentions of the plaintiff in error in the court below, so far as they embrace questions which this court has power to decide, may be stated as follows:

First. That Section 30 of the Act of 1869 as amended, when considered independently of the Act of 1899 in relation to casualty companies and the Act of 1919 in rela-

tion to the taxation of non-resident corporations, is in violation of Section One of the Fourteenth Amendment to the United States Constitution.

Second. That if Section 30 of the Act of 1869 as amended, when considered independently of the Acts of 1899 and 1919, is not in violation of Section One of the Fourteenth Amendment it must be held to be in conflict therewith because of the provisions of the Act of 1899 authorizing foreign casualty insurance companies to make insurance of some of the kinds made by fire, marine and inland navigation insurance companies without requiring such casualty companies to pay the tax provided for by said Section 30.

Third. That if Section 30 of the Act of 1869, considered independently of the Acts of 1899 and 1919, was not when enacted in conflict with Section One of the Fourteenth Amendment it came into conflict with it upon the adoption of the Act of 1919 because of the imposition by that Act upon all foreign insurance companies of a gross receipts tax of 2 per cent for the privilege of transacting business within the State.

Because these contentions may be numerous and may involve a consideration of a considerable number of statutory provisions it does not follow that they are at all difficult to dispose of. They have already been disposed of so frequently by the decisions of this court that the conclusion is irresistible that this writ of error is brought solely for the purpose of delay and that the questions on which the decision of the case depend are so frivolous as not to need further argument than that which may be made in support or in opposition to a motion to affirm.

BRIEF.

I.

IS SECTION 30 OF THE ACT OF 1869 AS AMENDED, WHEN CONSTRUED INDEPENDENTLY OF THE ACTS OF 1899 AND 1919, IN VIOLATION OF SECTION ONE OF THE FOURTEENTH AMENDMENT?

Foreign fire, marine and inland navigation insurance companies secured their right to come into the State of Illinois and to transact business there solely by the provisions of the act entitled "*An Act to incorporate and to govern fire, marine and inland navigation insurance companies doing business in the State of Illinois,*" in force March 11 and July 1, 1869, as amended by subsequent acts (*Post*, 25-33). That act imposed upon every such foreign insurance company two requirements:

First. It required it, after taking certain preliminary steps, to procure annually from the insurance superintendent a certificate of authority stating that it had complied with the requisitions of the act. It could not lawfully transact business in the State without first procuring this certificate. This was the requirement provided for in Section 22. (*Post*, 28-33.)

Second. After thus coming into the State and transacting business in pursuance of the certificate it was required to comply with Section 30 (*Post* 33) the provisions of which are as follows:

"Every agent of any insurance company, incorporated by the authority of any other State or government, shall return to the proper officer of the

county, town or municipality in which the agency is established, in the month of May, annually, the amount of the net receipts of such agency for the preceding year, which shall be entered on the tax lists of the county, town and municipality, and subject to the same rate of taxation, for all purposes, State, county, town and municipal—that other personal property is subject to at the place where located; said tax to be in lien of all town and municipal licenses; and all laws and parts of laws inconsistent herewith are hereby repealed. Provided, that the provisions of this section shall not be construed to prohibit cities having an organized fire department from levying a tax, or license fee, not exceeding two per cent in accordance with the provisions of their respective charters, on the gross receipts of such agency, to be applied exclusively to the support of the fire department of such city.”

That the General Assembly of Illinois has the right to prescribe the terms and conditions upon which foreign corporations, other than corporations engaged in interstate commerce and those which are instrumentalities of the United States Government, may do business in the State, or may prevent them from entering or transacting business within its borders, has been settled by numerous decisions, among which are the following:

Paul v. Virginia, 8 Wall. 168 (19 L. E. 357).

Ducat v. City of Chicago, 10 Wall. 410 (19 L. E. 972).

Liverpool Insurance Co. v. Oliver, 10 Wall. 566 (19 L. E. 1029).

Fire Association of Philadelphia v. New York, 119 U. S. 110 (30 L. E. 342).

Pembina Mining Co. v. Pennsylvania, 125 U. S. 181 (31 L. E. 656).

Horn Silver Mining Co. v. New York, 143 U. S. 305 (36 L. E. 164).

Hooper v. California, 155 U. S. 648 (39 L. E. 297).

American Smelting & Refining Co. v. Colorado, 204 U. S. 103 (51 L. E. 393).

There is no conflict of authority upon this proposition, though occasionally differences of opinion have arisen as to its application.

By this Act of 1869 the State, in effect, said to foreign fire, marine and inland navigation insurance companies:

“Upon your complying with certain requirements imposed for the security of your policy holders we will issue to you a license authorizing you to transact business within our borders. Having obtained that license, if you proceed to transact business in pursuance of it, you must pay a tax each year upon the net receipts of your agencies.”

Is it not plain that the tax provided for by said Section 30 is intended as compensation to the State for granting to the foreign insurance company the privilege of transacting business within its borders?

Is it not also plain that when the insurance company applies for and obtains the certificate authorizing it to exercise the privilege it impliedly contracts to pay the compensation which Section 30 says it must pay if it does exercise it?

In *Ducat v. City of Chicago*, 10 Wall. 410 (19 L. E. 972), the questions presented were not different, in substance, from those now to be considered. There was there brought in question an act of the General Assembly of Illinois providing that all foreign insurance companies engaged in effecting insurance in the City of Chicago should pay to the State Treasurer the sum of \$2 upon \$100 and at the same rate upon the amount of all premiums which should have been received, designating the

time and mode of payment. The counsel for the plaintiff in error, in his argument to this court, stated the facts and his contentions as follows:

"The Insurance Companies complied with every requirement of law, and received licenses to do business throughout the State, and when they had thus become, as it were, legally domiciled within the State, and acquired property within its limits liable to taxation, the State attempted to authorize the City of Chicago, and also other cities in which the licensed agencies were established, to levy taxes upon that property, which were not imposed upon the property of the citizens of Illinois, merely because it belonged to corporations created in other States.

Neither in form, substance, nor effect, is the tax in question a license for the privilege of doing business. It was first enacted in 1845 (see Rev. L. of 1845, ch. 64, secs. 22, 23; 13 Ill. 554), and was changed in 1852, by an Act giving to an incorporated charitable institution the proceeds of the tax (21 Ills. 511); but in 1855 and 1857, the general laws were enacted, and in 1863, the charter of the City of Chicago was revised, and this tax was included in the revenue chapter of the charter, and required to be paid into the city treasury and appropriated to municipal purposes.

The laws of 1855-7 have been all this time in full force, and obedience to their requirements is strictly required, and thus we have a license system, and one of taxation, independent of each other, wholly applicable to foreign insurance companies.

This court has decided in *Paul's* case that the former is valid; it has also decided that unequal taxation, discriminating against the citizens of other States, is invalid; and as this is a tax and not a license fee or price paid for a license, it cannot be supported, either as a license or as a tax."

This court, however, after referring to its previous decision in *Paul v. Virginia*, 8 Wall. 168 (19 L. E. 357), said:

"The power of the State to discriminate between her own domestic corporations and those of other

states, desirous of transacting business within her jurisdiction, is clearly established in the case we have referred to, as it also had been in the previous case of *Bank of Augusta v. Earle*, 13 Pet. 519. As to the nature or degree of discrimination, it belongs to the State to determine subject only to such limitations on her sovereignty as may be found in the fundamental law of the Union. We find no such limitation in this case. Judgment affirmed."

The only difference worth mentioning between the *Ducat* case and the case now before the court is that in the *Ducat* case the disputed tax was provided for by an Act passed after the insurance company had come into the State and acquired property subject to taxation, while in the present case the tax is provided for in the very Act itself which permits the insurance company to transact business within the State. This difference, if it amounts to anything at all, makes the case now before the court a stronger one in favor of sustaining the law than the *Ducat* case.

The arguments made on behalf of plaintiff in error in the court below in this case were the same, in substance, as those presented on behalf of plaintiff in error in the *Ducat* case.

The Supreme Court of Illinois in *Hanover Fire Insurance Co. v. Carr*, 317 Ill. 366, 371-373, expressed its opinion of the nature of this tax as follows:

"The General Assembly has power to prescribe the terms and conditions upon which foreign corporations, other than corporations engaged in interstate commerce and those constituting instrumentalities of the United States Government, shall be allowed to do business in this State. The legislature has, if it desires to use it, power to prevent foreign corporations from entering or transacting any business within the borders of this State. * * *

“It is not contended that the legislature of this State may not levy such privilege tax as it chooses without regard to the constitutional provisions compelling uniformity and equal protection of the laws, but it is said that the tax here involved, having been held to be a tax on business, cannot be considered a privilege tax. This is a misconception of the term ‘tax on business.’ Having a right to prohibit a foreign corporation from entering the State to do business, it follows that *the legislature may exact such compensation for that privilege as it sees fit and levy the same in any manner or by any method it chooses.* The tax provided by Section 30 does not purport to be a property tax. Net receipts, of course, are personal property. The right given to the legislature to provide for the levying of taxes on property requires that the property be valued by an assessor or some person provided by law to fix the valuation thereof. The Revenue Act, in compliance with this mandate, provides that the assessor fix the value of such personal property as of the first day of April. It will be noted that under Section 30 complained of the net receipts of foreign insurance companies such as appellant are not to be valued by an assessor or other authority, nor is the assessment to be based on property having a situs in this State on April first. In fact, it is not required that the net receipts acquire or retain a situs in this State at any time. It is a tax on the amount of business done and *for the privilege of continuing in such business*, and the net receipts of such business are used as the basis of determining that tax. Such net receipts and the method prescribed constitute the thing and the means by which is to be determined *the amount which foreign fire, marine and inland navigation insurance companies shall pay to the State, and to the various municipalities included in the act,* AS COMPENSATION FOR THE RIGHT TO DO BUSINESS IN THE STATE AND IN SUCH MUNICIPALITIES. Section 30 provides that this tax shall be ‘in lieu of all town and municipal licenses,’ except for the support of organized fire departments. No constitutional prohibition exists against such a tax as a condition to the right to do

business. A tax on business as provided in this act, is not, as argued, to be distinguished from a privilege tax. Considered as either, it is a tax on the right to do business in this State and is subject to no constitutional limitations, except that it be 'uniform as to the class on which it operates.' * * *

The fact that a tax is a privilege tax does not necessarily require that it be paid as a condition precedent to entering the State. Such a condition, being precedent, could, of course, be met but once. However, the greatest financial benefit to such a company flows from the continuation of the privilege to do business. *Compensation for that privilege should be based on the benefits actually derived from the business done under such privilege. And such compensation must necessarily be assessed in some manner after the business is done and the benefits thereof received.* Section 30 provides a method by which the amount of this compensation shall be determined and assessed."

The decision of the Supreme Court of Illinois that the tax in question is a privilege tax levied as compensation for the privilege accorded the foreign insurance company of doing business in Illinois, being the construction of an Illinois statute, is binding upon this court and is not now subject to review.

Dibble v. Bellingham Bay Land Co., 163 U. S. 63, 73 (41 L. E. 72, 75).

Union National Bank v. Louisville, N. A. & C. R. Co., 163 U. S. 325, 331 (41 L. E. 177, 178).

Noble v. Mitchell, 164 U. S. 367 (41 L. E. 472).

Leffingwell v. Warren, 67 U. S. 2 (17 L. E. 261).

New York v. Weaver, 100 U. S. 539 (25 L. E. 705).

Osborne v. Florida, 164 U. S. 65 (41 L. E. 586).

Another answer, if one were necessary, to the contention of plaintiff in error that it is subjected to a tax to which Illinois corporations engaged in the same line

of business in which it is engaged are not subjected to may be found in the general revenue laws of this State.

Domestic fire, marine and inland navigation insurance companies in Illinois are assessed and taxed not only upon their real and personal property within the State, including choses in action, but also upon their capital stock, while foreign fire, marine and inland navigation insurance companies are taxed only on their real and personal property, if they have any, located in this State. They are not taxed upon their choses in action or upon their capital stock. (*Post*, pp. 33-35.)

Hence, while a company organized under the laws of Illinois must pay taxes, a foreign insurance company can transact its business within the State of Illinois without paying any tax such as Illinois corporations are required to pay, for a foreign insurance company need not own any real estate or any tangible personal property within the State. Therefore, it having no real or personal property which can be taxed and its capital stock not being subject to taxation, it can escape taxation under the General Revenue laws of the State completely. On the other hand, the company organized under the laws of Illinois, which must compete in business with the foreign company, cannot escape taxation. It is true it might transact business within the State without owning any real estate or any tangible personal property, but it could not transact business without having cash on hand or in bank, choses in action and a capital stock upon all of which it must pay taxes.

If, therefore, plaintiff in error is right in its contention that Section 30 of the Act of 1869 is invalid because insurance companies organized under the laws of Illinois are not subjected to the tax provided for by that section,

what would be said in reply to a claim by an insurance company organized under the laws of Illinois if it should assert it was denied the equal protection of the laws because its capital stock was taxed and the capital stock of foreign companies, which were its competitors, was not taxed?

In *Hanover Fire Insurance Co. v. Carr*, 317 Ill. 366, 367, the court in dealing with this point said:

“Foreign insurance companies have, or may have, in this State on April first, when assessments on personal property are made, practically nothing of value, while domestic fire insurance companies are assessed for all of their holdings, both real and personal, including their choses in action, little, if any, of which tax is paid by foreign insurance companies. If it were to be said that Section 30 violates the uniformity clause of the Constitution for the reason that foreign fire insurance companies, when admitted to this State, should not be required to pay any tax which domestic insurance companies do not pay, by the same token domestic insurance companies, which pay on all of their property, could justly complain that the revenue law as applied to them is invalid for the reason that it, in effect, does not apply to foreign insurance companies doing a like business in the State; because such companies by reason of the withdrawal of their net receipts, are able to escape all, or practically all, property taxation.”

Disregarding, then, subsequent legislation, none of which was adopted until 1899, we have simply two methods of taxation of fire, marine and inland navigation insurance companies. One of these methods was applied to Illinois corporations, they being taxed upon their real estate and tangible personal property located within the State, their choses in action and their capital stock. The other was applied to foreign corporations, they being taxed upon their real estate and tangible personal prop-

erty within the State, if they had any, and upon their net receipts, but not upon their choses in action or upon their capital stock.

Either this division of fire, marine and inland navigation insurance companies into the two classes, domestic and foreign, was permissible or all the laws of the State relating to the taxation of those companies were invalid. That it was not forbidden by the Constitution of Illinois is conclusively settled by the decision of the court below, its construction of that constitution being binding upon this court.

It is plain that Section 30 of the Act of 1869 is sustainable both on the ground that the Legislature of Illinois had the power to divide the companies into the two classes for purposes of taxation and also upon the ground that it had the power to exclude foreign companies from the State altogether or, if it chose to admit them, to impose such obligations upon them as it saw fit.

It was also contended in the court below that said Section 30 was in violation of the Fourteenth Amendment because the tax there provided for was not imposed upon individuals, or associations of individuals, doing an insurance business. This contention is not worthy of serious consideration. Individuals who are citizens of other states cannot be taxed differently than individuals who are citizens of the state imposing the tax. They are not required to secure any license that citizens of this State may not be required to procure to transact business. The State cannot discriminate between its own individual citizens and the individual citizens of other states, but it can discriminate between corporations which it creates and corporations created by other states.

II.

IF SECTION 30 OF THE ACT OF 1869 AS AMENDED, WHEN CONSIDERED INDEPENDENTLY OF THE ACTS OF 1899 AND 1919, IS NOT IN VIOLATION OF SECTION 1 OF THE FOURTEENTH AMENDMENT MUST IT BE HELD TO BE IN CONFLICT THEREWITH BECAUSE OF THE PROVISIONS OF THE ACT OF 1899 AUTHORIZING FOREIGN CASUALTY INSURANCE COMPANIES TO MAKE INSURANCE OF SOME OF THE KINDS MADE BY FIRE, MARINE AND INLAND NAVIGATION INSURANCE COMPANIES WITHOUT REQUIRING SUCH CASUALTY COMPANIES TO PAY THE TAX PROVIDED FOR BY SAID SECTION 30?

Down to July 1, 1899, there were only three kinds of insurance companies recognized by the laws of Illinois, one being fire, marine and inland navigation insurance companies, one being life insurance companies and the other being accident insurance companies insuring against loss of life or personal injury resulting from accident. In 1899 for the first time domestic casualty insurance companies were authorized to be organized and foreign casualty companies were empowered to transact business in the State upon complying with certain requirements. (*Post*, pp. 36-39.)

Casualty insurance companies were authorized by this Act of 1899 (*Post*, pp. 36-37) to write insurance of the following kinds which were among those which fire, marine and inland navigation insurance companies were also authorized to write, to wit: (1) sprinkler leakage insur-

ance; (2) crop and live stock insurance; (3) explosion insurance, and (4) automobile (theft, collision, etc.) insurance.

Foreign casualty insurance companies were not required to pay any tax on their net receipts, or any part thereof, such as that provided for by Section 30 of the Act of 1869, derived from either of these four kinds of insurance. For this reason plaintiff in error insists that fire, marine and inland navigation insurance companies were so discriminated against as to render said Section 30 in conflict with Section 1 of the Fourteenth Amendment.

This contention is plainly without merit. The General Assembly of Illinois apparently concluded there were good reasons why foreign fire, marine and inland navigation insurance companies should pay a tax upon receipts from all the kinds of insurance they wrote and that those reasons did not apply to other companies who wrote some of the same kinds of insurance. Whether a court would consider these reasons as good is immaterial. The only question for a court to consider is whether the General Assembly had the power to make a distinction between the different classes of companies.

Possibly it may not be wise to tax foreign fire, marine and inland navigation insurance companies on all their receipts and not to tax casualty companies who write some of the same kinds of business. It may be illogical. It may seem, to the court, unjust and oppressive. That is not important. The court may not be possessed of all the facts necessary to the forming of a correct judgment as to what is unjust and oppressive. Judicial wisdom is one thing while legislative wisdom is another. Each department of the Government should give the other department the credit of possessing good common sense and each should be supreme in its own sphere.

The General Assembly of Illinois had the power to exclude altogether fire, marine and inland navigation insurance companies from transacting business within the State. It could have authorized casualty insurance companies to do business in the State while at the same time excluding fire, marine and inland navigation insurance companies from that privilege. If it thought the public good required that casualty companies should be permitted to transact business within the State without paying any compensation for the privilege, while foreign fire, marine and inland navigation insurance companies, if they transacted business in the State, were required to pay for the privilege, it had the right to do as it pleased in reference to the matter.

As we have seen in *Ducat v. City of Chicago*, 10 Wall. 410 (19 L. E. 973), in dealing with the right of this State to discriminate between domestic corporations and those of other states, the court said:

“As to the nature or degree of discrimination, it belongs to the State to determine, subject to only such limitations upon her sovereignty as may be found in the fundamental law of the Union.”

What is thus said applies with equal force to discriminations between different classes of foreign corporations.

There is another objection to the contention of plaintiff in error as to the effect of the Casualty Insurance Company Act. If it had the effect of destroying Section 30 of the Act of 1869 the result, as we have already suggested, would be that insurance companies organized under the laws of Illinois would be subject to taxation while foreign insurance companies would be exempt therefrom. In that case the Illinois corporations would be quite likely to appeal to the courts for protection against the violation of Section 1 of the Fourteenth Amendment

and that appeal would necessarily be successful if the argument of plaintiff in error is sound.

Again, if the provisions of Section 30 of the Act of 1869 and those of the Casualty Insurance Act of 1899 cannot both stand and be given effect, which ones must we reject? Shall we cast out Section 30 of the Act of 1869 and let foreign fire, marine and inland navigation insurance companies do business in Illinois in competition with Illinois companies without paying any compensation therefor, or shall we cast out foreign casualty insurance companies and let foreign fire, marine and inland navigation insurance companies continue in business?

III.

IF SECTION 30 OF THE ACT OF 1869 CONSIDERED INDEPENDENTLY OF THE ACTS OF 1899 AND 1919 WAS NOT, WHEN ENACTED, IN CONFLICT WITH SECTION 1 OF THE FOURTEENTH AMENDMENT, DID IT COME IN CONFLICT THEREWITH UPON THE ADOPTION OF THE ACT OF 1919 BECAUSE OF THE IMPOSITION BY THAT ACT UPON ALL INSURANCE COMPANIES OF A GROSS RECEIPTS TAX OF TWO PER CENT FOR THE PRIVILEGE OF TRANSACTING BUSINESS WITHIN THE STATE?

The contention of plaintiff in error is that upon the adoption of the Act of 1919, by which all non-resident insurance companies were required to pay an annual state tax of two per cent per annum on their gross premiums for the privilege of doing an insurance business in Illinois, the payment of that tax entitled them to come into the State and transact business and that, having thus

come into the State, they were entitled to the same treatment as that accorded to Illinois insurance companies doing the same kinds of business. To this claim there are, we submit, several sufficient answers.

First. Section 1 of the Act of 1919 (*Post*, pp. 39-41), after providing for the gross premiums tax of two per cent, contains the following:

"But this Act shall not be construed to prohibit the levy and collection of any state, county or municipal taxes upon the real and personal property of such corporations, companies and associations, nor to prohibit the levy and collection of taxes for the benefit of organized fire departments in cities and villages, nor to prevent the levy and collection of taxes for the purpose of maintaining the office of the Fire Marshall of this State and paying the expenses incident, *nor prevent the levy and collection of the tax authorized by Section 30 of an act entitled 'An Act to incorporate and to govern fire, marine and inland navigation insurance companies doing business in the State of Illinois,' approved March 11, 1869, in force July 1, 1869, as amended.*"

Thus, there is clearly expressed the legislative intent that the Act of 1919 was not to affect Section 30 of the Act of 1869, but that the provisions of said Section 30 were to remain still in force.

The effect of the Act of 1919 was the same as if Section 1 had read as follows:

"Section 1. *Be it enacted by the People of the State of Illinois represented in the General Assembly:* That all non-resident corporations, companies and associations licensed and admitted to do an insurance business in this State shall, except as herein otherwise provided, pay an annual State tax for the privilege of doing an insurance business in this State equal to two per cent on the gross amount of premiums received during the preceding calendar year on contracts covering risks within this State * * *

and in addition thereto every agent of a fire, marine and inland navigation insurance company incorporated by the authority of any other State or government shall return to the proper officer of the county, town or municipality in which the agency is established, in the month of May, annually, the amount of the net receipts of such agency for the preceding year, which shall be entered on the tax lists of the county, town or municipality, and subject to the same rate of taxation for all purposes, State, county, town or municipal—that other personal property is subject to at the place where located.”

The two acts thus combined into one would have provided two forms of compensation for the privilege accorded foreign insurance companies of transacting business within this State and there can be no doubt that is what the legislature intended.

There is no difference between the character or purpose of the taxation provided for by the two acts. Both impose taxes which are clearly privilege taxes, that is to say, compensation for the privilege of transacting business within this State. Both are based upon the company's receipts for the preceding year and not upon those of the succeeding year.

The General Assembly in imposing a privilege tax may adopt any method it sees fit to adopt. It may impose a license fee or it may impose a business tax. In the two acts referred to it has chosen the latter method. The only difference between the two acts, so far as the purpose of the tax is concerned, is that in one the tax is declared to be one “for the privilege of doing an insurance business,” while in the other nothing is said about its purpose.

Apart from this it is plain that a business tax is necessarily a privilege tax for its only foundation is the priv-

ilege which the State grants to the taxpayer of carrying on the particular business taxed.

In dealing with the Act of 1919 the Supreme Court of Illinois (*Hanover Fire Insurance Co. v. Carr*, 317 Ill. 366, 375), said:

“While the Act of 1919 entitled ‘An Act in relation to the taxation of non-resident corporations, companies and associations for the privilege of doing an insurance business in this State,’ approved June 28, 1919, (Laws of 1919, p. 626), imposes an annual State tax equal to two per cent on the gross amount of premiums received by any foreign insurance company during the preceding year, less certain specified deductions, for the privilege of doing business in this State, that fact does not show that the tax imposed upon the business of fire insurance by Section 30 is not likewise a tax for the privilege of doing business. The Act of 1919 requires that the tax be levied and paid to the State. Section 30 requires that the tax be apportioned among the State and the different municipalities of the situs of the agency. A valid reason is seen for this distribution of the tax. The foreign fire insurance company takes its net profits largely from the vicinity of its agency, and it is but just that it return to the municipality in which its agency is located something in lieu of the taxes that would otherwise be realized from such net receipts as are taken away.”

There are cases such as *Southern Railway Co. v. Greene*, 216 U. S. 400, in which it is held that when a foreign corporation has come into a State in reliance upon its laws and has acquired property in the State of a permanent nature the legislature of the State cannot thereafter discriminate in matters of taxation between such a corporation and a similar domestic corporation. Plaintiff in error's case is not of that character. It has not acquired within the State of Illinois any property of a permanent nature. The taxation imposed upon it is precisely

that which it was notified would be imposed upon it if it chose to come into the State and transact business there.

Somewhat similar to *Southern Railway Co. v. Greene*, 216 U. S. 460, is *American Smelting & Refining Co. v. Colorado*, 204 U. S. 103. In that case the American Smelting & Refining Company had come into the State on the faith of a law of Colorado which, as construed by this court, amounted to a contract that the company's taxation should be no different than that imposed upon domestic corporations of a similar character, and, after coming into the State, had acquired property of a fixed and permanent nature. Plaintiff in error was not coaxed into the State of Illinois by any law which promised that its taxation would be no different from that imposed upon domestic corporations. It was expressly notified that its taxation would be different from that imposed upon domestic corporations. It is not, therefore, in a position to complain of being compelled to pay what the law authorizing it to transact business in the State said it should pay if it chose to come into the State and transact business.

CONCLUSION.

Every question which is presented in this case, and which it is within the province of this court to decide, has been decided so many times that, we submit, it is evident that this writ of error is prosecuted for purposes of delay only and the questions presented have been decided so many times adversely to the contentions of plaintiff in error that they may be justly characterized as frivolous. The case can be decided upon the argument presented in support of and in opposition to a motion to affirm quite as accurately as it could be were it permitted to remain upon the docket to be called in its order and argued orally. It involves the revenues of a State and its municipal corporations and for that reason speed in its disposition is desirable.

We submit, therefore, that the motion to affirm should be sustained and the judgment of the Supreme Court of Illinois affirmed.

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APPENDIX.

I.

ACT OF 1869 IN RELATION TO FIRE, MARINE
AND INLAND NAVIGATION INSURANCE COM-
PANIES.

The provisions of this Act as amended by subsequent acts, so far as they may have any bearing upon the validity of Section 30, which provides for the tax now in question, are contained in Sections 1, 1a, 22 and 30. They provide as follows:

“An Act to incorporate and to govern fire, marine and inland navigation insurance companies doing business in the State of Illinois, approved and in force March 11 and July 1, 1869, (Laws of 1869, p. 209), as amended by subsequent acts (Laws of 1879, p. 178; Laws of 1881, p. 99; Laws of 1889, p. 246; Laws of 1899, pp. 176, 246; Laws of 1905, p. 290; Laws of 1912, p. 45; Laws of 1919, p. 613).

SECTIONS 1 AND 1A.

Section 1. WHO MAY FORM CORPORATION—PURPOSES.) *Be it enacted by the People of the State of Illinois represented in the General Assembly, That any number of persons, not less than thirteen (13) may associate and form an incorporated company for the following purposes, to-wit: To make insurance on dwelling houses, stores, and all kinds of buildings, and upon household furniture and other property, against loss or damage by fire, lighting and tornadoes, or either or any of said causes and the risks of inland navigation and transportation. Any and all insurance companies heretofore or here-*

after incorporated under the provisions of this Act, which shall, in the declaration and charter provided to be filed, have expressed an intention to make insurance, or shall have power to make insurance against loss or damage by the risks of inland navigation or transportation, shall have power to make insurance upon vessels, boats, cargoes, goods, merchandise, freights, and other property, against loss and damage by all or any of the risks of ocean, lake, river, canal and inland navigation and transportation, and against loss or damage by explosion, whether fire ensues or not, except upon steam boilers and pipes, fly wheels, engines and machinery connected therewith or operated thereby.

Section 1-a. INSURANCE OF MOTOR VEHICLES.] That all insurance companies authorized to transact the business of fire, marine or inland navigation insurance in this State, may, in addition to the business which they are now authorized by law to do, insure automobiles or other motor vehicles, whether stationary or being operated under their own power, against all or any of the risks of fire, lightning, wind storm, tornadoes, cyclones, explosions, hail storms, transportation by land or by water, theft and collision, upon filing with the Insurance Department of the State of Illinois official notification of their purpose so to do: *Provided*, the same shall be clearly expressed in the policies."

(NOTE. As originally adopted in 1869 the Act gave fire, marine and inland navigation insurance companies only the following powers:

To make insurance on dwelling houses, stores and all kinds of buildings and upon household furniture and other property, against loss or damage by fire, and the risks of inland navigation and transportation, and also to make insurance upon vessels, boats, cargoes, goods, merchandise, freight and other property against loss and damage by all or any of the risks of lake, canal and inland navigation and transportation.

By amendatory acts the following additional powers were given:

The power to insure against loss or damage by lightning was added by the Act of 1879.

The power to insure against loss by tornadoes was added by the Act of 1881. Section 1a was added by the Act of 1912.

The power to insure vessels, boats, cargoes, goods, merchandise, freight and other property against loss and damage by all or any of the risks of ocean, and against loss or damage by explosion, whether fire ensues or not, except upon steam boilers and pipes, fly wheels, engines, and machinery connected therewith or operated thereby were added by the Act of 1919.

These powers were also added to by separate independent acts, not purporting to be amendatory, which acts were as follows:

"An Act authorizing fire insurance companies to insure against loss or damage by lightning, wind storms, hail storms and tornadoes and cyclones. In force July 1, 1885. (Laws of 1885, p. 209.)

Section 1. LIGHTNING AND TORNADO INSURANCE PERMITTED.) *Be it enacted by the People of the State of Illinois represented in the General Assembly, That all insurance companies heretofore organized under any law or laws of the State of Illinois, having power to make insurance against loss by fire, are hereby authorized to insure houses, buildings, growing crops, live stock, and other property against loss or damage by lightning, wind storms, hail storms, tornadoes and cyclones, or either or all of them: Provided, the same shall be clearly expressed in the policies."*

"An Act authorizing fire insurance companies to insure sprinklers, pumps or other fire apparatus, and also to insure against loss or damage by the same. In force July 1, 1905. (Laws of 1905, p. 290.)

Section 1. FIRE PREVENTION APPARATUS MAY BE INSURED—INSURANCE AGAINST DAMAGES BY:) *Be it enacted by the People of the State of Illinois represented in the General Assembly, That all insurance companies authorized to transact fire insurance business in this State may, in addition to the business which they are now authorized by law to do, insure sprinklers, pumps, and other apparatus, erected, used or put in position for the purpose of extinguishing fires, against damage or loss or injury resulting from any cause whatsoever; and may also insure any property which such companies are authorized to insure against loss or damage by fire, against damage, loss or injury by water or otherwise, resulting from the breaking of or injury to such sprinklers, pumps or other apparatus, or from the use or operation of the same, arising from any cause whatever, upon filing with the Insurance Department of the State of Illinois official notification of their purpose so to do: Provided, the same shall be clearly expressed in the policies."*

The foregoing provisions of Sections 1 and 1a of the Act of 1869 as amended, together with the subsequent separate and independent acts, express all the powers of insurance granted to fire, marine and inland navigation insurance companies which were in force during the year commencing May 1, 1922, and ending April 30, 1923.)

SECTION 22.

"Section 22. FOREIGN COMPANIES — ASSETS — AGENTS—SERVICE OF PROCESS.) It shall not be lawful for any insurance company, association or partnership incorporated by or organized under the laws of any other state of the United States, or any foreign government, for any of the purposes specified in this act, directly or indirectly, to take risks or to transact any business of insurance in this State unless possessed of the amount of actual capital required of similar companies formed under the provisions of this act; nor shall it be lawful for any mutual insur-

ance company of any other state to transact any kind of business within this State other than that prescribed by section 13 of this Act, unless said company is possessed of an amount of cash assets over and above all liabilities, including re-insurance reserve equal to the amount of capital stock required of stock companies; and any such company desiring to transact any such business as aforesaid by any agent or agents in this State, shall first appoint an attorney in this State on whom process of law can be served, and file in the office of the insurance superintendent a written instrument duly signed and sealed, certifying such appointment, which shall continue until another attorney be substituted, and in case of death or removal of said attorney so designated by said company, service of any process from any court in this State on the superintendent of insurance during such vacancy shall be sufficient until said company shall appoint another attorney, as required by this act; and any process issued by any court of record in this State and served upon such attorney by the proper officer of the county in which such attorney may reside, or may be found, shall be deemed a sufficient service of process upon such company, but service of process upon such company may also be made in any other manner provided by law.

“SERVICE AFTER COMPANY STOPS BUSINESS.) In case any insurance company not incorporated in this State shall cease to transact business in the State according to the laws thereof, the agents last designated or acting as such for such corporation, shall be deemed to continue agents for such corporation for the purpose of serving process for commencing action upon any policy or liability issued or contracted while such corporation transacted business in this State, and service of such process for the cause aforesaid upon any such agent, shall be deemed a valid personal service upon such corporation.

“CERTIFIED COPY OF CHARTER—STATEMENT.) And every such company, association or partnership shall also file a certified copy of their charter or deed of settlement, together with a statement, under the oath of the president or vice-president or other chief offi-

cer and secretary of the company for which he or they may act, stating the name of the company and place where located, the amount of its capital, with a detailed statement of its assets, showing the amount of cash on hand, in bank or in the hands of agents, the amount of real estate and how the same is incumbered by mortgage, the number of shares of stock of every kind owned by the company, the par and market value of the same, amount loaned on bond and mortgage, the amount loaned on other security, stating the kind and the amount loaned on each, and the estimated value of the whole amount of such securities; any other assets or property of the company, also stating the indebtedness of the company, the amount of losses adjusted and unpaid, the amount incurred and in process of adjustment, the amount resisted by the company as illegal and fraudulent, and all other claims existing against the company; also a copy of the last annual report, if any, made under any law of the state by which said company was incorporated, and no agent shall be allowed to transact business for any such company whose capital (or if a mutual company whose reinsurance reserve as required in section 13 of this act) is impaired to the extent of twenty per cent thereof, which such deficiency shall continue.

“DEPOSIT.) And any company incorporated by or organized under any foreign government shall, in addition to the foregoing, deposit with the insurance superintendent for the benefit and security of policyholders residing in the United States, a sum not less than two hundred thousand dollars (\$200,000), in stocks of the United States, or of the State of Illinois, in all cases to be equal to a stock producing six per cent per annum—said stocks not to be received by said insurance superintendent at a rate above their par value, or above their current market value—or in bonds and mortgages on improved unincumbered real estate in the State of Illinois, worth fifty per cent more than the amount loaned thereon.

“EXCHANGE OF SECURITIES.) The stocks and securities so deposited may be exchanged from time to time for other securities as aforesaid.

“INTEREST—FEES.) And so long as the company so depositing shall continue solvent, and comply with the laws of this State, such company or association may be permitted by the said insurance superintendent to collect the interest or dividends on said deposits; and where a deposit is made of bonds and mortgages, accompanied by full abstracts of title and searches, the fees for an examination of title by counsel, to be paid by the party making the deposit, shall not exceed twenty dollars for each mortgage, and the fee for an appraisal of property shall be five dollars to each appraiser, not exceeding two, besides expenses for mortgage.

“CERTIFICATES OF AUTHORITY.) Nor shall it be lawful for any agent or agents to act for any company or companies referred to in this section, directly or indirectly, in taking risks or transacting the business of fire and inland navigation insurance in this State, without procuring annually from the insurance superintendent, a certificate of authority, stating that such company has complied with all the requisitions of this act which apply to such companies, and the name of the attorney appointed to act for the company.

“STATEMENT RENEWED YEARLY.) The statement and evidences of investments required by this section shall be renewed from year to year, in such manner and form as may be required by said insurance superintendent, with an additional statement of the amount of premiums received and losses incurred in the State during the preceding year, so long as such agency continues, and said insurance superintendent, on being satisfied that the capital, securities and investments remain secure, as hereinbefore provided, shall furnish a renewal of the certificate as aforesaid.

“PENALTIES.) Any violation of any of the provisions of this act shall subject the party violating the same to a penalty not exceeding five hundred dollars for each violation, and of the additional sum of one hundred dollars for each month during which any such agent shall neglect to file such affidavits and statements as are herein required.

"ADVERTISEMENTS OF AGENCY.) Every agent of any insurance company shall, in all advertisements of such agency, publish the location of the company, giving the name of the city, town or village in which the company is located, and the State or government under the laws of which it is organized. The term 'agent' or 'agents' used in this section shall include an acknowledged agent, surveyor, broker or any other person or persons who shall in any manner aid in transacting the insurance business of any insurance company not incorporated by the laws of this State.

"SECTION APPLIES TO ALL FOREIGN COMPANIES.) The provisions of this section shall apply to all foreign companies, partnerships, associations and individuals, whether incorporated or not. All insurance companies, associations or partnerships, incorporated by or organized under the laws of any other state of the United States, or any foreign government, transacting the business of fire or marine insurance, or any other kind of insurance in this State, shall make annual statements of their condition and affairs to the insurance superintendent's office, in the same manner and in the same form as similar companies organized under the laws of this State.

"PENALTY FOR NEGLECT TO MAKE ANNUAL STATEMENT.) In case of neglect or refusal to make such annual statement as aforesaid, all persons acting in this State as agents or otherwise in transacting the business of insurance for said companies, corporations, associations, partnerships or individuals, shall be subject to the same penalties provided by law in case of the failure of any insurance company organized under the laws of this State to make an annual statement as provided in this act.

"ANNUAL STATEMENTS, WHEN FILED.) Foreign insurance companies shall be required to make and file their annual statements and evidences on the first day of January in each year, or within thirty days thereafter, made out for the year ending on the preceding 30th of September. The supplementary annual statements of their business and affairs in the United States, duly verified by the resident manager

of such company, shall be filed in the month of January of each year, made out for the year ending the 31st day of December immediately preceding."

SECTION 30.

"Section 30. FOREIGN COMPANIES—TAX ON NET RECEIPTS.) Every agent of any insurance company, incorporated by the authority of any other State or government, shall return to the proper officer of the county, town or municipality in which the agency is established, in the month of May, annually, the amount of the net receipts of such agency for the preceding year, which shall be entered on the tax lists of the county, town and municipality, and subject to the same rate of taxation, for all purposes—State, county, town and municipal—that other personal property is subject to at the place where located; said tax to be in lieu of all town and municipal licenses; and all laws and parts of laws inconsistent herewith are hereby repealed: *Provided*, that the provisions of this section shall not be construed to prohibit cities having an organized fire department from levying a tax, or license fee, not exceeding two per cent in accordance with the provisions of their respective charters, on the gross receipts of such agency, to be applied exclusively to the support of the fire department of such city."

II.

ACT OF 1872 FOR THE ASSESSMENT OF PROPERTY AND THE LEVY AND COLLECTION OF TAXES.

The provisions of this Act as amended by subsequent Acts, so far as they may have any bearing upon the validity of Section 30 of the Act of 1869 which provides for the tax in question, are contained in Sections 1, 7 and 32, and provide as follows:

"An Act for the assessment of property and for the levy and collection of taxes. In force July 1,

1872 (Laws of 1871-2 p. 1), as amended by subsequent Acts. (Laws of 1879, p. 251; Laws of 1905, p. 353.)

"Section 1. WHAT PROPERTY LIABLE TO TAXATION.) *Be it enacted by the People of the State of Illinois represented in the General Assembly, That the property named in this section shall be assessed and taxed except so much thereof as may be, in this act, exempted:*

"First. All real and personal property in this State.

"Second. All moneys, credits, bonds or stocks and other investments, the shares of stock of incorporated companies and associations, and all other personal property, including property *in transitu* to or from this State, used, held, owned or controlled by persons residing in this State.

"Third. The shares of capital stock of banks and banking companies doing business in this State.

"Fourth. The capital stock of companies and associations incorporated under the laws of this State, except companies and associations organized for purely manufacturing and mercantile purposes, or for either of such purposes, or for the mining and sale of coal, or for printing, or for the publishing of newspapers, or for the improving and breeding of stock."

"Section 7. PERSONALTY AT PLACE OF OWNER'S RESIDENCE.) Personal property, except such as is required in this Act to be listed and assessed otherwise, shall be listed and assessed in the county, town, city, village or district where the owner resides.

"(STOCK AT PLACE OF CORPORATE OFFICE.) The capital stock and franchises of corporations and persons, except as may be otherwise provided, shall be listed and taxed in the county, town, district, city or village wherein the principal office or place of business of such corporation or person is located in this State. If there be no principal office or place of business in this State, then at the place in this State where any such corporation or person transacts business."

"Section 32. LISTING CAPITAL STOCK, CORPORATIONS, ETC.) Bridges, express, ferry, gravel road, gas, in-

insurance, mining, plank road, stage, steamboat, street railroad, transportation, turn-pike and all other companies and associations incorporated under the laws of this State, other than banks organized under any special or general law of this State, and companies and associations organized for purely manufacturing and mercantile purposes, or for either of such purposes, or for the mining and sale of coal, or for printing, or for publishing of newspapers, or for the improving and breeding of stock, shall in addition to other property required by this act to be listed, make out and deliver to the assessor a sworn statement of the amount of its capital stock, setting forth particularly:

“First. The name and location of the company or association.

“Second. The amount of capital stock authorized, and the number of shares into which such capital stock is divided.

“Third. The amount of capital stock paid up.

“Fourth. The market value, or if no market value, then the actual value of the shares of stock.

“Fifth. The total amount of all indebtedness except the indebtedness for current expenses, excluding from such expenses the amount paid for the purchase or improvement of property.

“Sixth. The assessed valuation of all its tangible property; such schedule shall be made in conformity to such instructions and forms as may be prescribed by the Auditor of Public Accounts. In all cases of failure or refusal of any person, officer, company or association to make such return or statement, it shall be the duty of the assessor to make such return or statement from the best information which he can obtain.”

III.

ACT OF 1899 IN RELATION TO CASUALTY INSURANCE COMPANIES.

The provisions of this act, as amended by subsequent acts, so far as they are claimed to have any bearing upon the validity of Section 30 of the fire, marine and inland navigation insurance company act, are contained in sections 1, 7 and 15 which provide as follows:

“Section 1. WHO MAY FORM—PURPOSES.) *Be it enacted by the People of the State of Illinois represented in the General Assembly:* Any number of persons, not less than thirteen, may, in the manner hereinafter prescribed, form a corporation for the purpose of issuing policies for any of the following kinds of insurance business:

“First—Insuring any persons against bodily injury, disablement or death resulting from accident, and providing benefits for disability caused by disease.

“Second—Insuring against loss or damage resulting from accident to, or injury suffered by, an employee or other person for which accident or injury the person insured is liable.

“Third—To guarantee or indemnify merchants, traders and all others engaged in business and giving credit therein from loss or damage by reason of giving or extending credit to their customers.

“Fourth—Against loss by burglary or theft or both.

“Fifth—Upon glass against breakage.

“Sixth—Upon steam boilers and pipes, engines and machinery connected therewith or operated thereby; against explosion and accident and loss or damage to life or property resulting therefrom and to make inspection of and to issue certificates of inspection upon such boilers and pipes, engines and machinery; also upon elevators and machinery forming a part thereof and to make inspection and to issue certificates of inspection upon the same.

"Seventh—Insuring against any hazard resulting from the ownership, maintenance or use of any automobile or other vehicle.

"Eighth—Against any other casualty or insurance risk specified in the articles of organization, which may lawfully be the subject of insurance and the formation of corporations for insuring against which is not otherwise provided for by these statutes."

"Section 7. FOREIGN CASUALTY—INSURANCE COMPANY, WHEN AUTHORIZED TO TRANSACT BUSINESS IN ILLINOIS.) Any casualty insurance corporation organized under the laws of any other state or foreign country may be admitted to transact business in this State by filing with the insurance superintendent for his approval, the following documents and papers:

"First—An application for license to do business in this State, setting forth the full name of the corporation, the location of its principal office of business, and, separately, the several kinds of business to be transacted; said application shall contain the declaration prescribed in an act entitled 'An Act for the better regulation of the business of insurance, and for the protection of the citizens of this State in their dealing with insurance companies,' approved June 4th, 1879, in force July 1st, 1879, and otherwise conform to the requirements of said act, and such company shall also be subject to all the provisions, requirements and penalties of said act upon such form of blank as the said superintendent may prescribe.

"Second—A certificate of deposit from the state official having the custody of the securities showing to the satisfaction of said insurance superintendent that the corporation has the amount of funds required by this act to be deposited by companies incorporated in this State invested in securities deposited with the superintendent of the insurance department, State Treasurer or other proper officer of the state in which it is incorporated, if incorporated in the United States, and if a foreign corporation, then in some one of the states of the United States, that such securities are not pledged or incumbered and have a market value of at least one

hundred thousand dollars, but are held and remain for the benefit and security of the policy-holders of such corporation residing in the United States, or in default of such certificate of deposit shall deposit with the insurance superintendent, for the benefit and security of its policy-holders the amount and kind of securities required to be deposited by companies of this State. The stocks and securities so deposited may be exchanged from time to time for other securities, to be approved by the insurance superintendent and so long as the corporation so depositing shall continue solvent and comply with the laws of this State, it may be permitted by the insurance superintendent to collect the interest or dividends on said securities.

“Third—A duly certified copy of its charter and by-laws together with a certificate from the insurance superintendent or other proper officer of the state wherein incorporated, that the corporation is duly organized and licensed to transact the business of casualty insurance in such state, stating separately the different kinds of insurance, as provided in section 1 of this act, together with an appointment of the insurance superintendent of this State, and his successors in office as attorney upon whom any summons, notice or process of any court of this State may be served.

“Fourth—A Complete Statement of the Financial Condition of the Corporation.) All such corporations admitted to transact business in this State must comply with the laws governing like corporations organized under the laws of this State, except that such corporations as are at the date of the passage of this act admitted to transact in this State more than four of the kinds of business named in subdivisions of section 1 hereof, may continue such business on a capital of not less than two hundred thousand dollars, and all such corporations and all persons acting as agents thereof shall be subject to the same penalties prescribed by these statutes relating thereto for a violation of any of the provisions thereof and to the same methods for the enforcement of such penalties. The said company shall apply annually to the

insurance superintendent for a certificate for each of its agents to do business in this State.

“Section 15. CERTIFICATE OF AUTHORITY TO AGENTS—PENALTY FOR VIOLATION OF SECTION.) No person, company or corporation shall act as agent for the purpose of soliciting risks or making insurance for any casualty insurance company incorporated under the laws of any other state or foreign country, directly or indirectly taking risks or transacting the business named in this act, in this State, without first procuring from the insurance superintendent a certificate of authority stating that such company has complied with all the laws of this State relating to such company, which certificate shall continue in force until the first day in March next after its issue unless revoked for cause. A fee of two dollars shall be paid to the superintendent for each such certificate. Any company, association, individual or individuals making insurance in violation of this act, or any person acting as agent or who shall solicit any insurance for such company, association, individual or individuals shall forfeit for each offense a sum not exceeding one thousand dollars.”

IV.

ACT OF 1919 IN RELATION TO A PRIVILEGE TAX.

The provisions of this Act, so far as this may have any bearing upon the validity of Section 30 of the Act of 1869, are contained in Sections 1, 3, 12 and 15, which provide as follows:

“An act in relation to the taxation of non-resident corporations, companies and associations for the privilege of doing an insurance business in this state. In force July 1, 1919. (Laws of 1919, p. 628.)

“Section 1. ANNUAL STATE PRIVILEGE TAX ON NON-RESIDENT COMPANIES—COMPUTATION—COMPANIES SUBJECT TO TAX—EFFECT ON OTHER TAXES AGAINST COMPANIES.) *Be it enacted by the People of the State of Illinois, represented in the General Assembly: That*

each non-resident corporation, company and association licensed and admitted to do an insurance business in this State shall, except as herein otherwise provided, pay an annual State tax for the privilege of doing an insurance business in this State, equal to two per centum on the gross amount of premiums received during the preceding calendar year on contracts covering risks within this State, which gross amount of premiums shall include all premiums received during the preceding calendar year on all policies, annuity contracts, certificates, renewals, policies subsequently cancelled, insurance and reinsurance executed, issued and delivered during such preceding calendar year, and all premiums that are received during such preceding calendar year on all policies, annuity contracts, certificates, renewals, policies subsequently cancelled, insurance and reinsurance executed, issued and delivered in all years prior to such preceding calendar year, whether such premiums were in the form of money, notes, credits or any other substitute for money, after deducting from such gross amount of premiums the amount of returned premiums on cancelled policies covering risks within this State (but returns on life insurance policies, commonly known as surrender values, shall not be considered returned premiums on cancelled policies); also the amount paid for reinsurance of risks within this State to companies duly licensed to transact business in this State, and also the amount returned to holders of policies on risks within this State as dividends, paid in cash or applied in the reduction of premiums.

"There shall be deducted from the tax thus computed the amount (if any) paid by such corporation, company or association, to cities and villages as a tax on premiums received by such corporation, company or association in such cities and villages during the preceding calendar year for the benefit of organized fire departments, and the remainder shall be assessed against such corporation, company or association as its annual privilege tax.

"This Act shall apply to all corporations, companies, and associations organized under the laws of

any other state, territory or foreign country and admitted to transact the business of insurance in this State on the stock, mutual, stock and mutual, or assessment plan. This Act, however, shall not apply to fraternal beneficiary associations or societies.

"The tax herein provided for shall be in lieu of all license fees or privilege or occupation taxes levied or assessed by any municipality in this State, and no municipality shall impose any license fee or privilege or occupation tax upon any such corporation, company or association, or any of its agents, for the privilege of doing an insurance business therein; but this Act shall not be construed to prohibit the levy and collection of any State, county or municipal taxes upon the real and personal property of such corporations, companies, and associations, nor to prohibit the levy and collection of taxes for the benefit of organized fire departments in cities and villages, nor to prevent the levy and collection of taxes for the purpose of maintaining the office of the Fire Marshal of this State and paying the expenses incident, nor to prevent the levy and collection of the tax authorized by section 30 of an Act entitled, 'An Act to incorporate and to govern fire, marine and inland navigation insurance companies doing business in the State of Illinois,' approved March 11, 1869, in force July 1, 1869, as amended."

"Section 3. ANNUAL REPORT BY COMPANY—REQUISITES.) Each insurance Company, corporation and association subject to the provisions of this Act shall, in addition to all other statements and reports required by law, make a report in writing to the Department of Trade and Commerce, not later than the first day of August, A. D. 1919, and not later than the first day of March in each year thereafter, on such forms as the Department of Trade and Commerce may prescribe. Such report shall, among other things, state:

"(1) The name of the corporation, company, or association.

"(2) The location of its principal office (if any) in this State, and the location of its principal office in the state of its domicile or entry.

"(3) The gross amount of premiums received by it during the preceding calendar year ending December 31, on contracts covering risks within this State, which gross amount of premiums shall include all premiums received during the preceding calendar year on all policies, annuity contracts, certificates, renewals, policies subsequently cancelled, insurance and reinsurance executed, issued and delivered during such preceding (preceding) calendar year, and all premiums that are received during such preceding calendar year on all policies, annuity contracts, certificates, renewals, policies subsequently cancelled, insurance and reinsurance executed, issued and delivered in all year prior to such preceding calendar year, whether such premiums were in the form of money, notes, credits, or any other substitute for money.

"(4) The amount of returned premiums on cancelled policies covering risks within this State (but returns on life insurance policies, commonly known as surrender values, shall not be considered returned premiums on cancelled policies), the amount paid for reinsurance of risks within this State to companies duly licensed to transact business in this State, and the amount returned to holders of policies on risks within this State as dividends, paid in cash or applied in the reduction of premiums.

"(5) The amount (if any) paid to cities and villages as a tax on premiums received by such corporation, company or association in such cities and villages during the preceding calendar year for the benefit of organized fire departments.

"Such report shall be signed and sworn to by the president, vice president, secretary, treasurer, or manager of the company, and in case the company is in the hands of an assignee or receiver, then such report shall be signed and sworn to by such assignee or receiver.

"Section 4. SUPPLEMENTAL REPORTS.) The Department of Trade and Commerce may require at any time further or supplemental reports, verified as herein prescribed, with reference to any matter pertinent to the proper assessment of the tax herein

provided for, and it shall be the duty of such corporations, companies and associations to promptly furnish such reports.

"Section 5. ASSESSMENT OF TAX.) The Department of Trade and Commerce shall, from the reports herein required to be filed with it, assess a tax at the rate herein prescribed against each corporation, company and association required herein to make such reports.

"Section 6. WHEN TAX DUE AND PAYABLE.) Except as otherwise provided in section 14 hereof, the tax herein provided to be paid shall be due and payable on the first day of July of each year, and shall be the tax for the year commencing on the first day of July in which it is due and ending on the thirtieth day of June next thereafter.

"Section 7. FAILURE OF COMPANY TO FILE ANNUAL REPORT—ASSESSMENT OF TAX—ADDITION OF PENALTY.) If any corporation, company or association, subject to the provisions of this Act, shall fail or refuse to file its annual report within the time required by this Act, the Department of Trade and Commerce shall assess a tax against such corporation, company or association, based upon the best possible available information, adding to such assessment a penalty of ten per centum upon such assessment.

"Section 8. OBJECTIONS TO AND MODIFICATION OF ASSESSMENT.) The Department of Trade and Commerce shall have power to hear and determine objections to any assessment, and, after hearing, to change or modify any assessment.

"Section 9. NOTICE OF TAX, ETC.—DUTY TO MAIL TO COMPANY—EFFECT OF COMPANY'S FAILURE TO REPORT.) On or before the fifteenth day of May of each year, the Department of Trade and Commerce shall mail a notice in writing to each corporation, company and association against which a tax is assessed, stating the amount of the tax assessed against it for the year next ensuing commencing on July 1, and that objections (if any) to such assessment will be heard by the Department of Trade and Commerce on a day stated therein, not later than the twenty-fifth day of June. Such notice shall further state that the tax

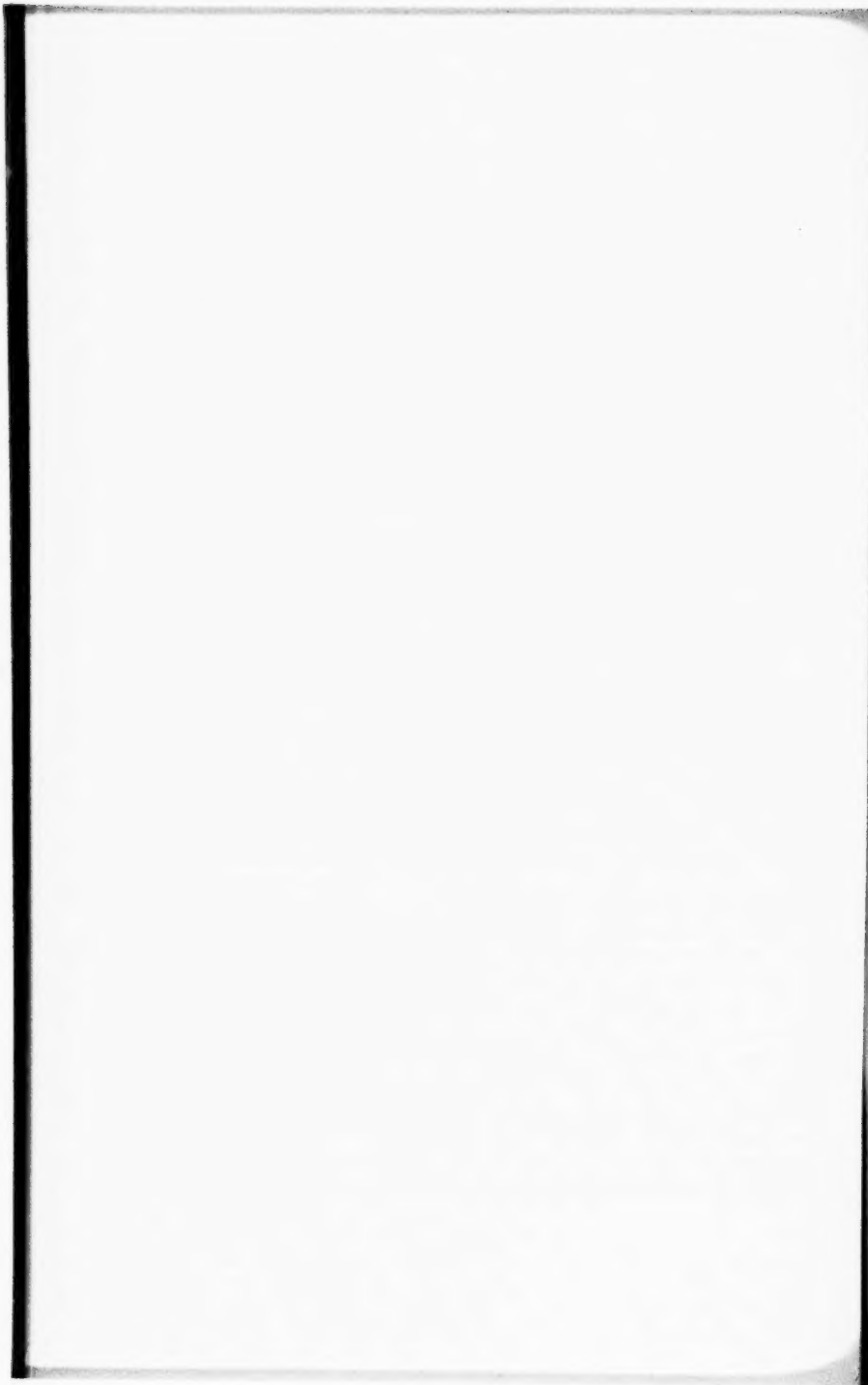
therein assessed is payable to the Department of Trade and Commerce on July 1 after the date of said notice. The notice required by this section shall be mailed to the corporation, company or association, addressed to its postoffice address as shown by the records in the office of the Department of Trade and Commerce. A failure to receive the notice mentioned in this section shall not relieve any corporation, company or association, of the obligation to pay such taxes, nor shall it invalidate the assessment of the tax.

“Section 10. WHEN TAX DELINQUENT—PENALTY.) If the tax assessed in accordance with the provisions of this Act shall not be paid on or before the thirty-first day of July of the year in which the assessment is made, it shall be deemed to be delinquent, and there shall be added a penalty of five per centum for each month or part of month that the same is delinquent, commencing with the month of August.

“Section 11. ACTION OF DEBT FOR TAXES AND PENALTIES.) The Department of Trade and Commerce, through the Attorney General, may at any time after the tax becomes delinquent institute an action of debt, in the name of the People of the State of Illinois, in any court of competent jurisdiction, for the recovery of the amount of such taxes and penalties due, and prosecute the same to final judgment, and take such steps as may be necessary to collect the same.

“Section 12. DEFAULT IN MATTER OF REPORT OR TAX—REVOCATION OR SUSPENSION OF COMPANY’S LICENSE.) If any corporation, company or association shall fail, neglect or refuse to make and file any report herein required, or shall fail, neglect or refuse to pay any tax assessed against it under the provisions of this Act, within thirty days after the same becomes due and payable, the Department of Trade and Commerce shall have power to revoke the license of such defaulting corporation, company or association to transact the business of insurance in this State, or it may suspend the same until such report or reports are filed or such tax and penalties (if any) are paid.

"Section 15. LICENSE TO DO BUSINESS—ISSUANCE—
DATE OF TERMINATION—RENEWAL.) The authority of
each non-resident corporation, company and asso-
ciation, admitted to do an insurance business in this
State, shall be evidenced by a license to be issued by
the Department of Trade and Commerce, in which
shall be stated the kind or kinds of insurance busi-
ness authorized to be transacted. All licenses issued
by virtue of the provisions hereof shall terminate on
the thirtieth day of June next after the date thereof,
and may be renewed annually thereafter upon com-
pliance with the laws of this State."



FILED

SEP 27 1926

WM. R. STANSBURY
CLERK

No. 179.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1926.

HANOVER FIRE INSURANCE COMPANY,
Plaintiff in Error,

vs.

PATRICK J. CARR, County Treasurer and Ex Officio County
Collector of Cook County, Illinois.
Defendant in Error.

ERROR TO THE SUPREME COURT OF ILLINOIS.

BRIEF FOR DEFENDANT IN ERROR.

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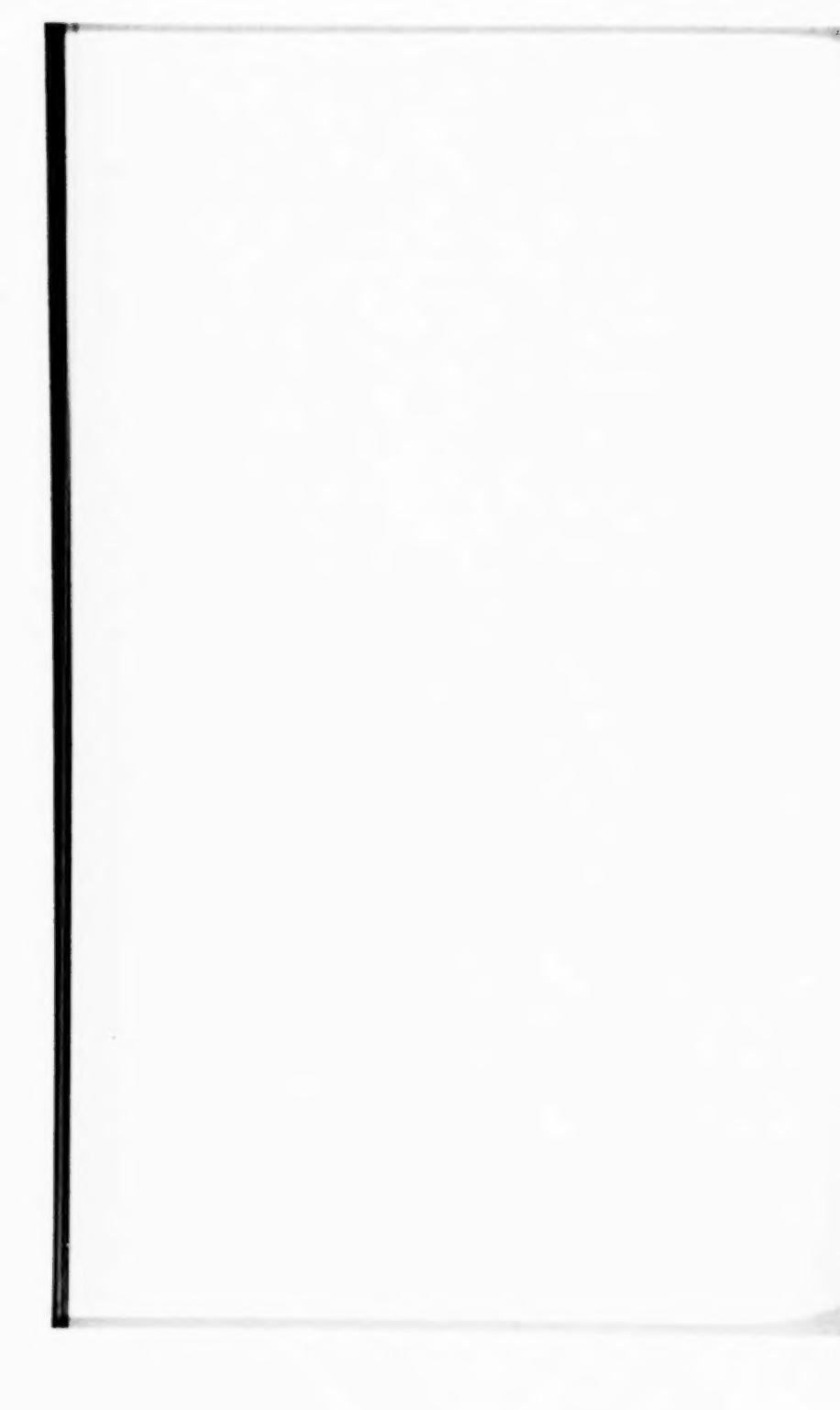
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Attorneys for Defendant in Error.



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IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1926.

No. 179.

HANOVER FIRE INSURANCE COMPANY,

Plaintiff in Error,

vs.

PATRICK J. CARR, County Treasurer and Ex Officio County
Collector of Cook County, Illinois,

Defendant in Error.

ERROR TO THE SUPREME COURT OF ILLINOIS.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF CASE.

The statement of facts made in the brief for plaintiff in error (pp. 1-10) is substantially correct with the following exceptions:

1. On page 3 it is stated as follows:

“All questions of local practice are eliminated by the pleadings, the answer filed by the defendant admitting expressly that *if the position of the plaintiff in error as to the character and legal effect of Section 30 is correct* then complainant is entitled to a decree permanently enjoining the tax. (Rec., 29.)”

The admission in the answer is that *if said Section 30 is in violation of any provisions of the constitution of*

the state or of the Fourteenth Amendment of the constitution of the United States, the complainant is entitled to such decree. The question is not what plaintiff in error's position may be, but it is whether Section 30 is invalid.

2. On page 4 it is stated as follows:

"The plaintiff in error lawfully did business in the State of Illinois for the year immediately preceding April 30, 1923, and had complied with all the conditions for entering upon and doing business in the State of Illinois. (Rec., 31-32.)"

This was not admitted in the answer or found in the decree. The finding of the decree (Rec., 32) was that the plaintiff in error *had in all things complied with each and every and all the terms, conditions and provisions of the Act of June 28, 1919. There was no finding that it had complied with the terms and conditions prescribed by the Act of 1869.* One of the "requisitions" of the latter act was compliance with Section 30 and the payment of the tax therein provided for. *Hanover Fire Insurance Company v. Carr*, 317 Ill. 366. *Plaintiff in error had not complied with that "requisition".*

The foregoing inaccuracies are, however, of very little importance and perhaps not sufficiently important to justify our pointing them out. They are, of course, not intentional.

The real and only question to be decided upon this writ of error is whether Section 30 of the Act of 1869 is in violation of the Fourteenth Amendment and the decision of that question, it being one of law only, in no manner depends upon what either party may admit or deny.

BRIEF.

I.

The State of Illinois had the right to prescribe the terms and conditions upon which plaintiff in error might transact business within the borders of the State.

Paul v. Virginia, 8 Wall. 168, 19 L. Ed. 357.

Ducat v. City of Chicago, 10 Wall. 410, 19 L. Ed. 972.

Liverpool Insurance Co. v. Massachusetts, 10 Wall. 566, 19 L. Ed. 1029.

Fire Association v. New York, 119 U. S. 110, 30 L. Ed. 342.

Pembina Mining Co. v. Pennsylvania, 125 U. S. 181, 31 L. Ed. 656.

Crutcher v. Kentucky, 141 U. S. 47, 35 L. Ed. 649.

Horn Silver Mining Co. v. New York, 143 U. S. 305, 36 L. Ed. 164.

Hooper v. California, 155 U. S. 648, 39 L. Ed. 297.

Baltic Mining Co. v. Massachusetts, 231 U. S. 68, 58 L. Ed. 627.

Cheney Brothers Co. v. Massachusetts, 246 U. S. 147, 62 L. Ed. 632.

Maine v. Grand Trunk R. Co., 142 U. S. 217, 35 L. Ed. 994.

II.

Plaintiff in error came into the State of Illinois for the transaction of business with full notice of the payments of money which it would be required to make.

Section 30 of the Act of 1869. (Appendix, *Post* p. 87.)

Sections 1, 7 and 32 of the General Revenue Act. (Appendix, *post*, pp. 88-90.)

Section 1 of the Fire Department Act of 1895. (Appendix, *post*, pp. 90-91.)

Section 1 of the State Fire Marshal Act of 1909. (Appendix, *post*, pp. 96-97.)

Section 1 of the so-called Privilege Tax Act of 1919. (Appendix, *post*, pp. 98-103.)

III.

The obligation of plaintiff in error is a contract obligation, the presumption being that when it accepted and exercised the privilege it assented to the obligation to pay the tax in question.

Travelers' Insurance Company v. Fricke, 99 Wis. 367, 74 N. W. 372.

State v. C. & N. W. Ry. Co., 128 Wis. 449, 108 N. W. 594.

State ex rel. Bain v. Seaboard & Roanoke R. R. Co., 52 Fed. 450.

Fire Association of Philadelphia v. New York, 119 U. S. 110, 30 L. Ed. 342.

American Smelting & Refining Co. v. Colorado, 204 U. S. 103, 51 L. Ed. 393.

Piqua Branch of State Bank v. Knoop, 16 How. 380, 14 L. Ed. 977.

Dodge v. Woolsey, 18 How. 331, 15 L. Ed. 401.

Powers v. Detroit, Grand Haven & Milwaukee Ry. Co., 201 U. S. 543, 50 L. Ed. 860.

United States v. Berdan Fire-Arms Manufacturing Co., 156 U. S. 552, 39 L. Ed. 531.

United States v. Societe Anonyme Des Anciens Etablissements Cail, 224 U. S. 309, 56 L. Ed. 778.

Clark v. United States, 95 U. S. 539, 24 L. Ed. 518.

Russell v. United States, 182 U. S. 516, 45 L. Ed. 1210.

United States v. Palmer, 128 U. S. 262, 32 L. Ed. 442.

Bell v. Farwell, 176 Ill. 489.

Fuller v. Ledden, 87 Ill. 310.

Bohn Manufacturing Co., v. Sawyer, 169 Mass. 477, 48 N. E. 620.

Smith v. Ingram, 90 Ala. 529, 8 South. 144.

Grant v. Dreyfus, 5 Calif. Unrep. 970; 52 Pac. 1074.

Smith v. Hughes, L. R. 6 Q. B. 597, 607.

Watters v. Glendenning, 87 Wis. 250, 58 N. W. 404.

IV.

The tax provided for by Section 30 of the Act of 1869 is a privilege tax and not a property tax.

Hanover Fire Insurance Co. v. Carr, 317 Ill. 366.

Ohio Tax Cases, 232 U. S. 576, 58 L. Ed. 737.

Choctaw, Oklahoma & Gulf R. R. Co. v. Harrison, 235 U. S. 292, 59 L. Ed. 234.

Meyer v. Wells Fargo & Co., 223 U. S. 298, 56 L. Ed. 445.

Pullman Company v. Knott, 235 U. S. 23, 59 L. Ed. 105.

Oliver Iron Mining Co. v. Lord, 262 U. S. 173,
67 L. Ed. 930.

Section 1 of Article IX of Constitution of Illinois.

St. Louis Cotton Compress Co. v. Arkansas, 260
U. S. 346, 67 L. Ed. 297.

Horn Silver Mining Co. v. New York, 143 U. S.
305, 36 L. Ed. 164.

Clement National Bank v. Vermont, 231 U. S.
120, 58 L. Ed. 147.

Truax v. Corrigan, 257 U. S. 312, 66 L. Ed. 254.

V.

Whether the tax in question is a privilege tax or a property tax is immaterial. The State may impose upon a foreign corporation a property tax different from that imposed upon a domestic corporation. The validity of the tax, or its character, is not determined by the mode adopted in fixing its amount.

Horn Silver Mining Co. v. New York, 143 U. S.
305, 36 L. Ed. 164.

Cheney Brothers Company v. Massachusetts,
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Maine v. Grand Trunk R. Co., 142 U. S. 217, 35
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Home Insurance Co. v. New York, 134 U. S. 594,
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VI.

The decision of the Supreme Court of Illinois that the tax provided for by Section 30 of the Act of 1869 is required to be extended against the entire amount of net receipts, being a construction of a statute of that state, is binding upon this court and furnishes no ground of relief to the complainant.

People v. Kent, 300 Ill. 324.

People v. Barrett, 309 Ill. 53.

Hanover Fire Insurance Co. v. Carr, 317 Ill. 366.

Truax v. Corrigan, 257 U. S. 312, 66 L. Ed. 254.

St. Louis Cotton Compress Co. v. Arkansas, 260 U. S. 346, 67 L. Ed. 397.

Section 1 of Article X of the Constitution of Illinois.

VII.

The Casualty Insurance Company Act does not operate to nullify Section 30 of the Act of 1869, the state having power to discriminate between the different classes of companies.

Northwestern Mutual Life Insurance Co. v. Wisconsin, 247 U. S. 132, 62 L. Ed. 1025.

Cheney Brothers Co. v. Massachusetts, 246 U. S. 147, 62 L. Ed. 632.

Ohio Tax Cases, 232 U. S. 576, 58 L. Ed. 737.

Armour Packing Co. v. Lacey, 200 U. S. 226, 50 L. Ed. 451.

Singer Sewing Machine Co. v. Bricknell, 233 U. S. 304, 58 L. Ed. 974.

Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 46 L. Ed. 679.

Fort Smith Lumber Co. v. Arkansas, 251 U. S. 532, 64 L. Ed. 396.

Quong Wing v. Kirkendall, 223 U. S. 59, 56 L. Ed. 350.

Southwestern Oil Company v. Texas, 217 U. S. 114, 54 L. Ed. 688.

VIII.

The privilege act of 1919 does not affect Section 30 of the Act of 1869.

Section 1 of the Act of 1919.

Horn Silver Mining Co. v. New York, 143 U. S. 305, 36 L. Ed. 164.

Cheney Brothers Co. v. Massachusetts, 246 U. S. 147, 62 L. Ed. 632.

Baltic Mining Co. v. Massachusetts, 231 U. S. 68, 58 L. Ed. 127.

Liverpool Insurance Co. v. Massachusetts, 10 Wallace 566, 19 L. Ed. 1029.

American Smelting & Refining Co. v. Colorado, 204 U. S. 103, 51 L. Ed. 393.

Southern Railway Co. v. Greene, 216 U. S. 400, 54 L. Ed. 563.

IX.

The dissenting opinion of Justices Thompson and Dunne is not supported by the authorities cited by them.

8 Fletcher Cyc. of Corporations, Sec. 5755.

Southern Railway Co. v. Greene, 216 U. S. 400, 54 L. Ed. 536.

Security Savings & Loan Association v. Albert, 153 Ind. 198, 54 N. E. 753.

Cheney Bros. Co. v. Massachusetts, 246 U. S. 147, 62 L. Ed. 632.

Greene v. Kentenia Corporation, 175 Ky. 661, 194 S. W. 820.

Fire Association of Pihladelphia v. New York, 119 U. S. 110, 30 L. Ed. 342.

X.

Every reasonable presumption must be indulged in favor of the validity of a statute when it is attacked as unconstitutional and it must be sustained unless its invalidity is clearly demonstrated.

Sweet v. Rechel, 159 U. S. 380, 40 L. Ed. 188.

Livingston County v. Darlington, 101 U. S. 407, 25 L. Ed. 1015.

Nicol v. Ames, 173 U. S. 509, 43 L. Ed. 786.

Buttfield v. Stranahan, 192 U. S. 492, 48 L. Ed. 534.

Powell v. Pennsylvania, 127 U. S. 685, 32 L. Ed. 256.

ARGUMENT.

I.

The State of Illinois had the right to prescribe the terms and conditions upon which plaintiff in error might transact business within the borders of the State.

Plaintiff in error was not an instrumentality of the United States Government, nor was it engaged in interstate commerce. It had not made any contract with the State limiting the State's right to impose taxes upon it. Therefore the State had the right to prohibit it absolutely from entering or transacting business within its borders, or, if it chose to permit it to do so, to fix the price which it should be required to pay for the privilege. Not only had it the right to fix the price, but it had the right to decide when and how it should be paid, whether it should all be paid in advance, or at the end of the period during which the privilege was exercised, or in partial payments during the period. That is the law as laid down by this court in repeated decisions and is as thoroughly settled as anything can be said to be settled by judicial decisions.

In *Horn Silver Mining Co. v. New York*, 143 U. S. 305 (36 L. Ed. 164), Mr. Justice Field in delivering the opinion of the court, among other things, said:

“The granting of the rights and privileges which constitute the franchises of a corporation being a matter resting entirely within the control of the legislature, to be exercised in its good pleasure, it may be accompanied with any such conditions as the legislature may deem most suitable to the public interest and policy. *It may impose as a condition of the grant as well as also of its continued existence*

*the payment of a specific sum to the State each year, or a portion of the profits or gross receipts of the corporation, and may prescribe such mode in which the sum shall be ascertained as may be deemed convenient and just. There is no constitutional inhibition against the legislature adopting any mode to arrive at the sum which it will exact as a condition of the creation of the corporation or of its continued existence. * * ** Having the absolute power of excluding the foreign corporation the State may, of course, impose such conditions upon permitting the corporation to do business within its limits as it may judge expedient. * * * The counsel for the appellant objects that the statute of New York is to be treated as a tax law, and not as a license to the corporation for permission to do business in the State. Conceding such to be the case we do not perceive how it in any respect affects the validity of the tax. *However it may be regarded, it is the condition upon which a foreign corporation can do business in the State, and in doing such business it puts itself under the law of the State, however that may be characterized."*

The rules thus expressed have been uniformly adhered to in subsequent cases other than those involving the rights of foreign corporations engaged in interstate commerce and those which are instrumentalities of the United States Government. The general statement, however, that "the State may, of course, impose such conditions upon permitting the corporation to do business within its limits as it may judge expedient" has been explained as not including the right of the State to impose conditions by which the corporation is required to waive some constitutional right, such as the right to invoke the jurisdiction of the Federal courts, the right to transact business in other states, the right to be free from the imposition of burdens upon interstate commerce, or the right to insist upon due process of law.

Baltic Mining Co. v. Mass., 231 U. S. 68, 58 Law Ed. 127.

Kansas City, etc., Ry. Co. v. Botkin, 240 U. S. 231, 60 Law Ed. 617.

Ohio River, etc., Ry. Co. v. Dittey, 232 U. S. 576, 58 Law Ed. 737.

Albert Pick & Co. v. Jordan, 169 Cal. 4, 145 Pac. 507.

Northern Pac. Ry. Co. v. Gifford, 25 Ida. 204, 136 Pac. 1133.

State v. Sessions, 95 Kan. 276, 147 Pac. 790.

Marconi Wireless Tel. Co. v. Commonwealth, 218 Mass. 572, 106 N. E. 316.

So far as concerns the right to exact money compensation for the privilege, to fix the amount of such compensation, the time of its payment and the manner in which the amount is to be ascertained, the doctrine announced in the opinion in the *Horn Silver Mining Company case* has not been varied from.

Upon examination of the brief filed by the Horn Silver Mining Company in that case (143 U. S. 305, 36 L. Ed. 164) it will be seen that the objections which it made to the tax there in question, other than those relating to the form and method of computing the tax, were practically the same as those now made in the instant case. It was objected that the taxes were not license taxes, but were taxes imposed for revenue under tax laws; that a license fee is imposed as a condition of privilege granted and must be accompanied by some grant of privilege upon condition of its payment; that there is a clear distinction between a license, granted or acquired as a condition precedent before a certain thing can be done, and a tax upon the business which that license may authorize one to engage in; that the criterion of the amount imposed upon the corporations showed the law to be an exercise of the taxing power; that the law, therefore, could obtain no support from any assumed principle or

rule of law that any burden might be imposed upon a foreign corporation as a condition of doing business in any state; and that the Legislature could not, because of its power to impose a burden upon foreign corporations as a condition of doing business, take money or property from a foreign corporation, already lawfully doing business there, by an absolute and unconditional demand. Those objections did not avail to defeat the tax. Nevertheless in the instant case they are again put forward and urged as reasons why the tax now in question should be held illegal.

In *Ducat v. City of Chicago*, 10 Wall. 10 (19 L. Ed. 972) there was brought in question an act of the General Assembly of Illinois providing that all foreign fire insurance companies engaged in effecting insurance in the City of Chicago should pay to the State Treasurer the sum of \$2 upon \$100 and at the same rate upon the amount of all premiums which should have been received, designating the time and mode of payment. The arguments used to defeat the tax were in substance the same as those subsequently advanced in the *Horn Silver Mining Company case*. The court, however, after referring to *Paul v. Virginia*, 8 Wall. 168 (19 L. Ed. 357), sustained the tax as valid, and in doing so said:

“The power of the State to discriminate between her own domestic corporations and those of other states, desirous of transacting business within her jurisdiction, is clearly established in the case we have referred to, as it also had been in the previous case of *Bank of Augusta v. Earle*, 13 Pet. 519. *As to the nature or degree of discrimination, it belongs to the State to determine subject only to such limitations on her sovereignty as may be found in the fundamental law of the Union.*”

In *Cheney Brothers Company v. Massachusetts*, 246 U. S. 147 (62 L. Ed. 632), the court held that a state may impose a rate of taxation upon a foreign corpora-

tion for the privilege of doing business within the state which differs from the rate which it applies to its own corporations upon the franchises which the state grants in creating them and that a state does not surrender or abridge its power to change or revise its taxing system and tax rates by merely licensing or permitting a foreign corporation to engage in local business and acquire property within its limits. In dealing in that case with the taxation of a company called the White Company the court said:

"This is an Ohio corporation which is conducting a business, conceded to be local, in Massachusetts. On being admitted to do business therein it acquired two pieces of land in Boston, and at large cost specially improved and adapted them for use, the one as an automobile station and the other as a garage. A subsequent change in the statute made the excise tax more onerous than before, without, as it is said, any corresponding change being made in the law relating to domestic corporations. In these circumstances the company insists that by the imposition of the tax, as defined in the statute of 1909, it is denied the equal protection of the laws."

After quoting the comments of the Supreme Judicial Court of Massachusetts upon *Southern Ry. Co. v. Greene*, 216 U. S. 400 (54 L. Ed. 536), the court further said:

"Assenting, as we do, to what was thus said, it suffices to add, first, that a state does not surrender or abridge its power to change and revise its taxing system and tax rates by merely licensing or permitting a foreign corporation to engage in local business and acquire property within its limits, and, second, that 'a state may impose a different rate of taxation upon a foreign corporation for the privilege of doing business within the state than it applies to its own corporations upon the franchise which the state grants in creating them.'"

These and the other authorities cited in the Brief (*ante*, p. 3-4) would seem to be conclusive in support of the State's contention that it had the power to prescribe

the payments which plaintiff in error must make, whether by way of license fees or taxes or otherwise, if it chose to enter the State and transact business therein, as well as to prescribe the mode in which the sum to be paid should be ascertained, the time of its payment and the officer or officers to whom it was to be made. Hence the provision in Section 30 of the Act of 1869 for ascertaining the amount of the payment and the manner in which it was to be collected was clearly one which the State had the right to make.

It is said, however, that the language of said Section 30 shows that the exaction there provided for was intended to be a tax imposed for the purpose of raising revenue and not a condition precedent upon which the company should be permitted to carry on its business or as compensation for such permission. But it is not necessary that a condition imposed as compensation should be one which must be fully performed before the company enters the State, any more than it is necessary that an owner of land, when making a lease, should see to it that all of the rent is paid in advance. As is well said by the Supreme Court of Illinois in *Hanover Insurance Company v. Carr*, 317 Ill. 366, 373.

“The fact that a tax is a privilege tax does not necessarily require that it be paid as a condition precedent to entering the State. Such a condition, being precedent, could, of course, be met but once. However the greatest financial benefit to such company flows from the continuation of the privilege to do business. Compensation for that privilege should be based on the benefits actually derived from the business done under such privilege. And such compensation must necessarily be assessed in some manner after the business is done and the benefits thereof received.”

There can be no limit upon the power of the State as to the amount of compensation it will exact for the priv-

ilege, or the manner in which it will require the amount to be computed, or the time when it will require it to be paid. This follows from its power to exclude the foreign corporation entirely. *The whole is greater than any of its parts. The whole is equal to the sum of all its parts.* The power to admit upon conditions as to money compensation, whatever those conditions may be, is less than the power to exclude entirely.

II.

Plaintiff in error came into the State of Illinois for the transaction of business with full notice of the payments of money which it would be required to make.

When plaintiff in error came into the State of Illinois it did so with knowledge of the provisions of law which were then in force and of the burdens which would be imposed upon it if it chose to come in and transact business. These provisions, so far as they related to money payments, were the following:

FIRST. *Section 30 of the Act of 1869 (Appendix, Post p. 87.)*

This is the one out of which the present controversy arises. It contains the following provisions:

1. That the company's agent "shall return to the proper officer of the county, town or municipality in which the agency is established, in the month of May annually, the amount of the net receipts of such agency for the preceding year, which shall be entered on the tax lists of the county, town or municipality and subject to the same rate of taxation for all purposes—state, county, town and municipal—that other personal property is subject to at the place where located."

As construed by the Supreme Court of Illinois in *People v. Kent*, 300 Ill. 324, *People v. Barrett*, 309 Ill.

53, and *Hanover Fire Insurance Company v. Carr*, 317 Ill. 366, these net receipts were not to be assessed or valued, but the tax was to be computed upon the full amount.

2. That said tax shall be "in lieu of all town and municipal licenses," excepting that cities having an organized fire department may levy "a tax, or license fee, not exceeding two per cent, in accordance with the provisions of their respective charters, on the gross receipts of such agency, to be applied exclusively to the support of the fire department of such city."

This amounted to an agreement on the part of the State that the company should not be subjected to any town or municipal license fees other than those levied for the support of fire departments and that the taxes levied for that purpose should in no event exceed two per cent of the company's gross receipts.

SECOND. *Sections 1, 7 and 23 of the General Revenue Act (Appendix, post, pp. 88-90.)*

These sections provide for the assessment and taxation of real and personal property in the State and require that all real and personal property within the State shall be assessed and taxed. They discriminate, however, between domestic companies and foreign companies in this, that whereas domestic companies are assessed and taxed upon their capital stock as well as upon their real estate and tangible personal property, foreign companies are not assessed upon their capital stock, but only upon such real estate and tangible personal property as they may own within the State. Therefore, as a foreign company having a paid in capital stock of \$5,000,000, which has a par value of that amount, can carry on business in Illinois without owning any real or tangible personal property within the State at the times when assessments are made, it can escape all taxa-

tion under the General Revenue Act, whereas a company organized under the laws of Illinois with a paid in capital stock of \$5,000,000, which has a par value of that amount, must pay the annual tax rate for all purposes on that \$5,000,000, or the equalized assessed valuation thereof, as well as upon its real estate and tangible personal property within the State if it has any, although it may do no more or even much less business within the State than the foreign company.

THIRD. *Section 1 of the Fire Department Act of 1895* (Appendix, *post*, pp. 90-91.)

This section requires that all foreign fire insurance companies "which are engaged in any city, town or village, organized under any general or special law of this State, in affecting fire insurance shall pay to the treasurer of the city, town or village, for the maintenance, use and benefit of the fire department thereof, a sum of not exceeding two per cent of the gross receipts received by their agency in such city, town or village," and it empowers cities, towns and villages by ordinance to prescribe the amount of tax or license fee to be fixed not in excess of that rate. This is the license tax referred to in the proviso of Section 30 of the Act of 1869, which, as there stated, was not to be one in excess of two per cent of the gross receipts of the agency.

FOURTH. *Section 12 of the State Fire Marshal Act* (Appendix, *post*, pp. 96-97.)

This provides, among other things, that every fire insurance company shall pay annually not exceeding one-fourth of one per cent of its gross premium receipts on business done in Illinois during the preceding year and that the amounts so paid shall constitute a special fund for the maintenance and expenses of the Department of Fire Marshal.

FIFTH. *Section 1 of the so-called Privilege Tax Act of 1919.* (Appendix, *post*, pp. 98-103.)

This section provides in substance that "each non-resident corporation, company and association licensed and admitted to do an insurance business in this State shall, except as herein otherwise provided, pay an annual *State* tax for the privilege of doing an insurance business in this State equal to two per centum on the gross amount of premiums received during the preceding calendar year on contracts covering risks within this State." From this tax there is to be deducted the above mentioned Fire Department Tax.

It further provides not only that this *State* tax "shall be in lieu of all license fees or privilege or occupation taxes *levied or assessed by any municipality in this State,*" but also that "this Act shall not be construed to prohibit the levy and collection of any state, county or municipal taxes upon the real and personal property of such corporations, companies and associations, nor to prohibit the levy and collection of taxes for the benefit of organized fire departments in cities and villages, nor to prevent the levy and collection of taxes for the purpose of maintaining the office of the Fire Marshal of this State and paying the expenses incident, *nor to prevent the levy and collection of the tax authorized by Section 30 of an Act entitled 'An Act to incorporate and to govern fire, marine and inland navigation insurance companies doing business in the State of Illinois,' approved March 11, 1869, in force July 1, 1869, as amended.*" This latter is the tax now in controversy.

Thus the Hanover Company was notified that the two per cent gross receipts tax was a purely *State* tax required to be paid *in addition* to the tax provided for by Section 30 of the Act of 1869.

The Act of 1919, therefore, amounted to a re-enactment of Section 30 of the Act of 1869.

Plaintiff in error, it is plain, was not enticed into the

State by any misrepresentation as to the limit of what payments of money would be required of it and, after it had come in, subjected to additional burdens. Nothing is asked of it which it was not notified would be asked. It knew the State had the power to exclude it entirely, or to prescribe the terms upon which it might come in and transact business. If it was unwilling to make the payments which it was notified the State would exact it should have stayed out.

III.

The obligation of plaintiff in error is a contract obligation, the presumption being that when it accepted and exercised the privilege it assented to the obligation to pay the tax in question.

The equal protection of the laws clause of the Fourteenth Amendment was designed to protect individuals and corporations against acts of a state to which they did not consent, and not to relieve them from obligations to a state which they might voluntarily assume. If, therefore, there was a contract, express or implied, between the State and the Hanover Company which the latter voluntarily entered into and by which it obtained a privilege in consideration of a payment agreed to be made therefor to the State, the court will not find any warrant in the Fourteenth Amendment for aiding the company, after it has obtained what it bargained for, in repudiating its obligation to make the agreed payment.

The question, then, is did the Hanover Company contract, either expressly or impliedly, to pay the tax provided for by Section 30 of the Act of 1869?

The company could not lawfully enter the State and transact business there without first securing the State's permission. Such permission the State had the right to

either refuse or grant, and, if it chose to grant it, it had the right to specify the terms upon which the grant would be made. There were some terms which the State could not lawfully impose, such, for instance, as a waiver by the company of its right to invoke the jurisdiction of the federal courts, or of its right to transact business in other states, or of its right to the benefit of due process of law. (*Baltic Mining Co. v. Massachusetts*, 231 U. S. 68, 58 L. Ed. 627.) So far, however, as exacting a money compensation for the privilege was concerned, the power of the State was absolute. Had it chosen so to do, it might have granted the privilege as a pure gift without exacting any compensation or for a merely nominal compensation. On the other hand, it might have demanded a very large compensation—so large, in fact, as to have made the exercise of the privilege unprofitable.

Equally absolute and unrestricted was the power of the State with respect to the method by which the amount of the compensation should be ascertained and the time and manner of its payment. It could have required the payment of a fixed sum, such payment to be made all in advance, or partly in advance, and partly in subsequent installments, or all at the end of a specified period. It could have required the payment of a percentage of the company's gross receipts, or of its net receipts, either past or future, which percentage might have been a fixed percentage, or one made to vary from time to time according to circumstances, such, for instance, as changes in the property tax rates.

As was well said by the Supreme Court of Illinois in *State v. Illinois Central R. R. Co.*, 246 Ill. 188, 210:

"The validity of the tax can in no way be dependent upon the mode which the State may deem fit to adopt in fixing the amount for any year which it will exact for the franchise. No constitutional objection lies in the way of a legislative body prescribing any mode or measurement to determine the amount it will charge for the privilege it bestows."

To the same effect are:

Horn Silver Mining Co. v. New York, 143 U. S. 305 (36 L. Ed. 184), and

Maine v. Grand Trunk R. Co., 142 U. S. 217 (35 L. Ed. 994).

Stated shortly, the power of the State with respect to fixing the compensation to be paid by the company and the time and manner of its payment was as great as would be the power of an individual to fix the amount and the time and manner of the payment of the compensation for which he would grant the privilege of using his property.

On the other hand the State had no power or control over the Hanover Company, it not being within the State's jurisdiction. It could not tax it or exact money from it in any way so long as it remained out of its jurisdiction. Both parties, therefore, were independent of each other and could deal or not deal with each other as they saw fit.

That was the situation when the Hanover Company concluded it wished to carry on the insurance business in Illinois. It wanted something—a privilege—which the State had the power to grant or withhold. To enable it to obtain what it wanted, action on its part as well as on the part of the State was necessary. Such action on the part of the State must necessarily have consisted of an offer of the privilege and on the part of the company must have consisted of the acceptance of the offer.

The acceptance of an offer, when such offer is accompanied by a statement of what payment must be made by the one who accepts the offer creates a binding contract on his part to make the payment. This is the rule of law with respect to transactions between a state and an individual, or between two

individuals or two private corporations or between an individual and a private corporation. Familiar illustrations of the application of this rule are found in cases dealing with special charters granted by a state to corporations, general laws granting privileges to those who may choose to accept them, and offers made by individuals. Such grants by law and offers by individuals when accepted and acted upon, become contracts binding both upon those who make the grants or offers and those who accept them.

In the granting of a privilege to a corporation the State can only act by means of a law passed by its Legislature in which is stated under what circumstances and conditions it will grant the privilege, and, if it chooses to grant it, what the corporation which accepts it must do. Sometimes such law is a special law commonly called a charter and sometimes it is a general law. A general law granting privileges differs from a special law or charter for that purpose only in the circumstance that while the special law or charter offers the privileges to named individuals who are organized by the law into a corporation, a general law offers it to such individuals as may choose to avail of it, and for that purpose may organize themselves into corporations.

The most usual difference between a special charter and a general law granting privileges is that, as a general rule, a special charter is irrevocable, while a general law, as a general rule, is revocable or amendable at the will of the State, due regard being had, of course, to accrued rights. This, however, is not important, for any contract may be made revocable if the parties so agree and it is none the less a contract because of its revocability.

The acceptance of a special charter not only secures to the accepting corporation the privilege granted, but

binds it to do what such special charter requires it to do by way of compensation for the privilege. No good reason can be given why the same result should not follow from the acceptance of a general law and the exercise of the privileges thereby granted. A corporation which accepts a special charter cannot limit itself to the acceptance of the benefits granted by it and refuse to bear the burdens which it imposes. Why should any different rule apply to a corporation which accepts the benefits of a general law? Can it accept the benefits and then refused to bear the burdens?

A domestic corporation derives its existence from the State and the State may dictate the terms upon which it may come into existence as well as those upon which it may continue to exist. (*Horn Silver Mining Co. v. New York*, 143 U. S. 305, 36 L. Ed. 164, *supra*.) The law under which it is organized is its charter and it is bound to do what its charter requires it to do in respect to making payments which the State directs it to make. A foreign corporation derives its power to transact business within the State from the law which provides therefor and that law, as between it and the State, must be regarded as its charter.

That a general law of the State relating to the admission of foreign corporations to do business within the State may be so framed as to create a contract on the part of the State when the law has been acted upon by the foreign corporation must be regarded as settled by the decision of this court in *American Smelting & Refining Co. v. Colorado*, 204 U. S. 103 (51 L. Ed. 393.) The American Smelting & Refining Company entered the state in 1899 under permission granted by a general law which contained the following provision:

“And such corporations shall be subjected to all the liabilities, restrictions and duties which are or may be imposed on such corporations of like char-

acter organized under the general laws of this State and shall have no other or greater powers."

After the company had entered the State and had invested upwards of \$5,000,000 in the erection of a plant for the purpose of carrying on its business the Legislature of Colorado passed a law exacting from the company an annual tax or license fee in double the amount of that imposed upon domestic corporations. The court, in speaking of the provision above quoted, said:

"These provisions of law, existing when the corporation applied for leave to enter the State, made the payment required, and received its permit, amounted to a contract that the foreign corporation so permitted to come in the State and do business therein, while subjected to all, should not be subjected to any greater liabilities, restrictions or duties than then were or thereafter might be imposed upon domestic corporations of like character."

Of course it takes at least two parties to make a contract. The State could not well be held bound not to do what it said in the law it would not do unless the corporation was bound to do what the law said it should do. Therefore, it follows that the American Smelting and Refining Company, by accepting the benefits of the Colorado law of 1899, bound itself contractually to meet the liabilities and duties imposed by that law as did the State of Colorado bind itself contractually not to impose upon the company liabilities which were not imposed upon Colorado corporations of like character.

In *Piqua Branch of State Bank of Ohio v. Knoop*, 16 How. 380 (14 L. Ed. 977), an Ohio statute passed in 1845 provided that any number of individuals not less than five might form banking associations to carry on the business of banking in the State of Ohio. One of the provisions of the Act required the company semi-annually, on the days designated for declaring dividends,

to set off to the State six per cent on the profits, deducting therefrom the expenses and ascertained losses of the company for the six months next preceeding, which sum so set-off should be in lieu of all taxes to which the company, or the stockholders therein, would otherwise be subject. The court held that this provision of the act created a contract on the part of the State which prohibited it from taxing the company in any other manner than there provided.

In *Dodge v. Woolsey*, 18 How. 331 (15 L. Ed. 401), in passing upon the same statute, the court said:

“The law of 1845 was an agreement with the bank, *quasi ex contractu*—and also an agreement separately with the shareholders, *quasi ex contractu*—that neither the banks, as such, nor the stockholders as such, should be liable to any other tax larger than that which was to be levied under the 60th section of the Act of 1845.”

Surely if the State bound itself contractually not to impose upon any bank organized under the act a greater tax than that which the act provided for, the bank on its part bound itself contractually to pay the tax which the act required it to pay. The acceptance by the bank of the privileges offered by the law created an implied contract on its part to pay the State six per cent of the profits of the business ascertained in the manner specified in the law.

It has also been held that where a State by a general law authorizes the granting of privileges to corporations and specifies the payments which the corporations must make to the State, the acceptance of the privileges creates an implied agreement on the part of the corporations to make the payments.

In *Travelers Insurance Co. v. Fricke*, 99 Wis. 367 (74 N. W. 372), the insurance company brought an action in equity to enjoin the insurance commissioner of Wis-

consin from revoking a license issued by the commissioner to the company March 1, 1896, for failure of the company to pay license fees imposed by law for previous years. The court in deciding against the company, after pointing out that the company could only transact business in the State by permission of the State, and under such conditions as the State might impose, among other things, said:

"It was distinctly held by this court more than thirty years ago that substantially such a requirement as the one before us was not an exercise of the power of taxation. * * * Being a mere condition imposed as the price of a privilege which might be refused entirely, it logically follows that, when the privilege is requested, obtained and used, the corporation obtaining the privilege impliedly agrees to the conditions which go with it and upon which alone it can be obtained. *Fire Department v. Tuttle*, 48 Wis. 91, 4 N. W. 134; *id.*, 50 Wis. 552, 7 N. W. 549.

"By accepting the license and doing business under it, the company undoubtedly bound itself to comply with the law governing the issuance of the license. * * *

"We perceive no error in adjudging that the unpaid license fees bear legal interest from the various dates upon which they ought by law to have been paid. * * * If, as held in this opinion, there was an implied agreement by the company when it obtained a license and did business thereunder that it would perform all the requirements of law, including the payment of fees required at the proper time, no reason appears why the unpaid fees should not bear interest."

In *State v. Chicago & Northwestern Railway Co.*, 128 Wis. 449 (108 N. W. 594), the court considered a law requiring a railroad company to apply for a license to operate and to pay a license fee, being a certain portion of its gross receipts, payable one half at the time the license issued and one-half on or before the tenth

day of August of each year. The defendant, having obtained the license, proceeded to carry on its business. The court held that there was an implied contract on its part to pay the stipulated license fee. The statute was construed to be an offer to the company of the right to carry on its business on condition that it paid the stipulated license fee and the court held that the acceptance of such offer created a contract which bound the defendant to make payment. The court said:

“The payment by a railroad of a percentage of its gross earnings as compensation for the privilege of operating its road, or exemption of its property from the burdens of ordinary taxation, is generally spoken of as a tax, and properly so in the broad general sense. * * * However, such method involves the contractual element while taxation in the ordinary sense, taxation on property, which is regulated by Section 1, Article VIII of the Constitution, does not involve such element at all. * * * When we keep in mind the distinction between a privilege tax involving the element of contract, and a direct tax on property which does not involve such element, we can easily see that though the former are commonly and properly denominated taxes they are not referable to the taxing power in the constitutional sense. * * *

“The taxing law, so-called, under consideration, in the whole as indicated, involved, in legal effect, an exchange between the state and the railroad company of equivalents. The former accords the latter the privilege to operate its roads; the latter in consideration thereof renders to the former a proportion of its earnings. By operating the road the company impliedly promises to pay the state the specified compensation for such privilege, which is fixed and certain, since it is based on past business. The state by permitting the operation of the road acquires as an asset the statutory right to the specified proportion of the previous year's gross income. * * *

“There can be no difference as regards contractual relations between an accepted offer to a foreign corporation and one to a domestic corporation

of the privilege to do business in the State, the condition of the offer being the rendition of a stipulated revenue to the State."

After referring to *Insurance Company v. Fricke*, 99 Wis. 367, 74 N. W. 371, 78 N. W. 407, 41 L. R. A. 557, and *Maine v. Grand Trunk Railway Co. of Canada*, 142 U. S. 217, 35 L. Ed. 994, and quoting from the opinion in the latter case, the court said:

"The irresistible logic of these cases, and the principle to which we have referred, compels the conclusion that an accepted offer, under the system of legislation here, creates contractual obligations that cannot be discharged otherwise than by rendering the full amount contemplated by the promise."

After stating that the license fee was a special form of taxation the court further said:

"It differs from the ordinary form, mentioned and having its special limitations in the Constitution, in that it is neither direct on property nor does it involve merely the reciprocal duties mentioned. The addition to the public funds is made, in any instance, by the process of offering a privilege, under sovereign control to do so or not, and on acceptance, with the resulting element of implied promise to pay the required compensation. In that lies the contractual feature. While such a process, to a greater or lesser degree, has the element of compulsion, very much as in case of ordinary taxes, yet the initiative is in the nature of an offer of something, which, in contemplation of law, the sovereign may bestow or not at its pleasure, and with or without conditions, and which in such contemplation the one to whom the offer is made, is at liberty to accept or reject. In case of the former alternative being chosen, by operation of law, on familiar principles, the implied promise to pay results, which must necessarily be of the same dignity as any other such promise, as regards rights and remedies."

The Hanover Company was at liberty to reject the offer of the privilege to transact business in Illinois. It was not compelled to accept it. It did so voluntarily

and thereby impliedly promised to make the payments which the law granting the privilege required it to make.

In *State ex rel. Bain, Treasurer, v. Seaboard & Roanoke Railroad Company*, 52 Fed. 450, suit was brought by the Public Treasurer of North Carolina to recover a tax. The charter of the company passed in 1847 provided that its personal property should be exempt from any public charge or tax whatever for the term of fifteen years and that thereafter the Legislature might impose a tax not exceeding 25 cents per annum per share of the capital stock whenever the annual profits thereof should exceed six per cent. After 1866 the company earned upwards of six per cent on its shares. In 1891 the general assembly passed a law imposing a tax upon the company of 20 cents per annum upon each share of its capital stock for the years 1862 to 1892, inclusive. The court held that the tax could be collected for the years 1866 to 1891, inclusive. The court, among other things, said:

“The right of the State to collect the amount sued for does not grow out of its power to tax, *but out of its power to charge a price for the franchise granted by it.* It is not a tax on the property of the road or of the shareholders, because it is not measured by the value of the property or the shares. *It is an imposition annexed to the franchise as a royalty for the grant; the contract price to be paid by the company or its shareholders for the franchise granted to them.* *Bank of Commerce v. New York City*, 2 Black 620; *Attorney General v. Bank*, 4 Jones Eq. 287. This being the nature of the plaintiff’s right, no technical rules embarrass the questions in the case. They all depend on the ordinary rules relating to the construction of contracts. * * * The tax is a charge agreed upon between the parties,—the price put by the State upon the franchise purchased by the defendant—and has naught to do with anything other than the contract itself.”

That was a case of a special charter, but its reasoning is just as applicable to a case where the privilege exercised by the corporation is granted by a general law which also specifies what the corporation must do if it exercises the privilege. As the State, in the instant case, had the right "to charge a price for the franchise granted by it," when it specified that the corporation, if it exercised the privilege, should pay a tax levied in a certain way, and the corporation thereupon accepted the privilege, the corporation impliedly agreed to pay the tax to the same extent as if the privilege had been granted by a special charter which it had accepted. The tax was the contract price, or part of the contract price, which the company agreed to pay for the privilege granted to it.

In *Fire Association of Philadelphia v. New York*, 119 U. S. 110 (30 L. Ed. 342) a Pennsylvania corporation which was taxed in the State of New York was subjected to a license fee. The court held that by going into the State it assented to the payment of a license fee as a condition of its admission within the jurisdiction of New York.

There is no real difference between the situation of that company and that of the Hanover Insurance Company. When the Hanover Insurance Company came into the State it had notice of what it would be called upon to do and to pay if it transacted business within the State. The law required it to secure a license and thereafter to pay certain taxes. By accepting the license and transacting business within the State it impliedly agreed to pay the specified taxes. It could not be permitted after thus coming into the State and reaping profits from the transaction of business there to repudiate its obligation to pay the taxes.

In *Powers v. Detroit, Grand Haven & Milwaukee Ry.*

Co., 201 U. S. 543 (50 L. Ed. 860), Section 9 of the railway company's charter provided that,

"The said company shall on or before the first day of July pay the state treasurer an annual tax of one per cent on the capital stock of said company paid in, which tax shall be in lieu of all other taxes, except for penalties imposed upon said company by its act of incorporation or any other law of this state. The said tax shall be estimated upon the last annual report of said corporation."

The question was whether this section created a contract between the state and the company. The court among other things said:

"Surely no clearer case of contract can be presented than one in which a legislature passes an act in respect to a particular corporation making special provision concerning taxation, and does so with a view of inducing large expenditures by the corporation and the completion of an unfinished road whose completion is deemed of great public importance and where the special provision is as required, formally accepted, the expenditures made and the road completed."

Of course, if the State by passing the law in that form bound itself contractually to accept the specified tax "in lieu of all other taxes," the company by accepting the charter must have bound itself contractually to pay that tax.

In the instant case Section 30 of the Act of 1869 expressly provided that the net receipts tax was "to be in lieu of all town and municipal licenses" and that no fire department tax should be imposed upon the company in excess of two per cent of its gross receipts. This constituted a binding agreement on the part of the State. The Hanover Company accepted the benefit of it.

It was not necessary that the Hanover Company should declare in express terms that it would pay the tax in

question. It was sufficient that it should so act as to indicate its intention and willingness to do so, or, in other words, that its actions should be such as to establish an implied contract.

The rules applied in the ascertainment whether an implied contract has been established have been stated as follows:

“The law imputes to a person an intention corresponding to the reasonable meaning of his words and acts. It judges of his intention by his outward expressions and excludes all questions in regard to his unexpressed intention. If his words or acts, judged by a reasonable standard, manifest an intention to agree in regard to the matter in question, that agreement is established, and it is immaterial what may be the real but unexpressed state of his mind on the subject.”

“A contract implied in fact, or an implied contract in the proper sense, arises where the intention of the parties is not expressed, but an agreement in fact, creating an obligation, is implied or presumed from their acts, or, as it has been otherwise stated, where there are circumstances which, according to the ordinary course of dealing and the common understanding of men, show a mutual intent to contract. It follows that the only distinction between this species of contract and express contracts rests in the mode of proof; the nature of the understanding is the same, and both express contracts and contracts implied in fact are founded on the mutual agreement of the parties. The one class is proved by direct, the other by indirect, evidence; in other words, the one must be proved by an actual agreement, while in the case of the other it will be implied that the party did make such an agreement as, under the circumstances disclosed, he ought in fairness to have made.” (13 C. J. 241.)

There can be no question in this case as to the intention of the State with respect to this tax. It expected that any foreign insurance company which availed itself of the privilege offered would pay the tax. This ex-

pectation was justified by the fact that for fifty years after the Act of 1869 was passed foreign insurance companies treated the act as valid and paid, or pretended to pay, the tax. It would not be reasonable to suppose the State would have admitted the foreign insurance companies into the State if it had assumed they would have availed themselves of the privilege of transacting business and then refused to pay the tax.

Now what was the intention of the Hanover Company when it came into the State for the year commencing July 1, 1922, and applied for and obtained a certificate or license authorizing it to transact business? It did not declare it would not pay the tax. Its intention must be determined by its acts. The courts have had frequent occasion to decide questions of this character in controversies between individuals. We will refer to a few of them.

In *Grant v. Dreyfus*, 120 Cal. XVII, 52 Pac. 1074, the keeper of a pasture published in a newspaper a notice that he wanted every horse taken out as soon as possible, and, if not, the owner would be charged a certain amount per day. This was held sufficient to charge one who read the notice with the terms thereof as under an implied contract.

In *Smith v. Ingram*, 90 Ala. 529, 8 South. 144, the plaintiffs proposed to rent a store to the defendant for a year, which proposition was neither declined nor accepted. Subsequently defendant telephoned plaintiffs to know if it would be right to move in, and, receiving an affirmative reply, moved in. The court held this to be an acceptance of the terms previously offered.

In *Watters v. Glendenning*, 87 Wis. 250 (58 N. W. 404), a debtor offered to allow his creditor to take certain machinery from his mill in satisfaction of the debt. The creditor took the machinery four days thereafter. The

court held that this constituted an acceptance of the proposition.

In *Bohn Mfg. Co. v. Sawyer*, 169 Mass. 477, (48 N. E. 620), there was a contract for the sale of lumber. Defendant complained that the contract did not provide for insurance. Thereupon plaintiff wrote to defendant that he would get insurance on the lumber if defendant would pay half of the premiums. Defendant did not accept the proposition, but accepted and retained policies taken out by the plaintiff and wrote plaintiff several letters relating to the cancellation of policies and substituting others. The court held that these facts authorized the jury to find that the defendant had impliedly agreed to pay one-half of the premiums as proposed by the plaintiff.

In *Springer v. Cooper*, 11 Ill. App. 267, the owner of land, in a letter replying to tenants whose lease was about to expire and who proposed to rent the land for a new term, stated that, if he did not call or communicate with them further in the course of a few days, they could rely upon having the land on terms which modified the terms they proposed. The tenants, after a short time, proceeded to break up for and put in their wheat. This the court held to be an acceptance of the landlord's terms.

In *Orme v. Cooper*, 1 Ind. App. 449, 27 N. E. 655, plaintiff, after sending goods to the defendant to be sold by him, sent him a proposition to sell them to him at a price which was their fair market value. Defendant did not reply to the proposition but kept the goods. The court held this to be an acceptance of plaintiff's proposition.

In *Seal v. Erwin*, 2 Mart. (N. S.) 245, the court held that if A proposed to B to take charge of his plantation as overseer, B, by taking charge of it, evidenced his assent to the terms.

Other examples of implied contracts are cases cited in the brief (*ante*, p. 5.)

The Hanover Company may have had no intention, or it may have intended to avail itself of the privilege granted and then refuse to pay the tax.

In *Smith v. Hughes*, L. R. 6 Q. B. 597, 607, Blackburn, J., said:

"The rule of law is that stated in *Freeman v. Cooke*, 2 Exch. 654, 154 Reprint 652. If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."

It is a mistake to assume that a foreign corporation, when it deals with a State, is entitled to have its acts viewed differently from those of individuals when dealing with each other. The Fourteenth Amendment was not designed to furnish to foreign corporations a means of escaping liabilities which individuals could not escape under like circumstances. Good faith is presumed to be an element of all transactions by which one person acquires privileges or other property from another. It will not do to demand of individuals that they act in good faith and to permit a foreign corporation to practice deception.

The fact that the statute does not characterize the tax in question as compensation for the privilege but, on the contrary, treats it as an exaction imposed *in invitum* is immaterial. That it is compensation is self-evident. If the foreign insurance company remains out of the state there is no tax to pay, because the state has no jurisdiction over it. If it comes into the state but transacts no business there is no tax to pay. It is only when it

comes in and avails itself of the privilege granted that payment is required. As its coming in is plainly a matter of contract, the resultant obligation to pay the tax must also be one of contract.

IV.

The tax provided for by Section 30 of the Act of 1869 is a privilege tax and not a property tax.

In *Hanover Fire Insurance Company v. Carr*, 317 Ill. 366, the Supreme Court of Illinois supports its conclusion that the tax in question is a privilege tax, or a tax on business, and not a property tax by the following reasoning:

"The tax provided by Section 30 does not purport to be a property tax. Net receipts, of course, are personal property. The right given to the legislature to provide for the levying of taxes on property requires that the property be valued by an assessor or some person provided by law to fix the valuation thereof. The Revenue Act, in compliance with this mandate, provides that the assessor fix the value of such personal property as of the first day of April. *It will be noted that under Section 30 complained of the net receipts of foreign insurance companies such as appellant are not to be valued by an assessor or other authority, nor is the assessment to be based on property having a situs in this state on April 1st. In fact, it is not required that the net receipts acquire or retain a situs in this state at any time. It is a tax on the amount of business done and for the privilege of continuing in such business, and the net receipts of such business are used as the basis of determining that tax. Such net receipts and the method prescribed constitute the thing and the means by which is to be determined the amount which foreign fire, marine and inland navigation insurance companies shall pay to the state, and to the various municipalities included in the act, as compensation for the right to do business in the state and in such municipalities.*"

Plaintiff in error insists that the conclusion thus reached by the court is erroneous and that the tax is a property tax. In this plaintiff in error is mistaken.

First—This court has repeatedly decided the point contrary to plaintiff in error's contention.

In *Ohio Tax Cases*, 232 U. S. 576 (58 L. Ed. 737) there was called in question the law of the State of Ohio requiring every railroad doing business in the state to make a return upon its gross earnings from intrastate business, and imposing a tax of four per cent on such gross earnings. It was, among other things, contended that the tax was a tax upon property, but the court said:

"The exaction of four per cent of the gross intrastate earnings is not a property tax, but an excise tax, whose amount is fixed and measured by such earnings; and double taxation in a legal sense does not exist unless a double tax is levied upon the same property within the same jurisdiction. Plaintiffs in error pay one tax with respect to property, another with respect to the privilege or occupation; hence the taxation is not double."

The only difference between that case and the instant case is that there the tax was one upon gross receipts and the percentage of the tax was fixed and unchangeable while in the instant case the tax is upon net receipts and the percentage is changeable from year to year, the amount depending upon the annual tax rate.

In *Choctaw, Oklahoma & Gulf R. R. Co. v. Harrison*, 235 U. S. 292 (59 L. Ed. 234) an Oklahoma statute provided that every person, firm, association or corporation engaged in the mining or production within that state of coal should file quarterly with the State Auditor, a statement under oath showing the gross amount of mineral produced and the actual cash value thereof, and should at the same time pay to the state treasurer a gross revenue tax which should be in addition to the taxes levied and collected upon an *ad valorem* basis upon such

mining property and the appurtenances thereto belonging equal to two per centum of the gross receipts from the total production of coal therefrom. The question was whether the tax was a privilege tax or whether it was a tax on personal property. The court said:

"Neither state courts nor legislatures, by giving a tax a particular name, or by the use of some form of words, can take away our duty to consider its real nature and effect. *Galveston, H. & S. A. R. Co. v. Texas*, 210 U. S. 217, 227, 52 L. Ed. 1031, 1037, 28 Sup. Ct. Rep. 638.

"It is unnecessary to consider the power of the State of Oklahoma to treat coals dug from mines operated by the appellant as other personalty, and to subject them to a uniform *ad valorem* tax, for it seems to us clear that the act of 1908 provided for no such imposition. Its very language imposes a 'gross revenue tax which shall be in addition to the taxes levied and collected upon an *ad valorem* basis.' We cannot, therefore, conclude that the gross receipts were intended merely to represent the measure of the value of property liable to a general assessment—provision is made for determining that upon a different basis. *Meyer v. Wells, F. & Co.*, 223 U. S. 298, 301, 56 L. Ed. 445, 447, 32 Sup. Ct. Rep. 218. *The requirement is not on account of property owned on a given day, as is the general custom where ad valorem taxes are provided for, and as the Oklahoma laws require; but the manifest purpose is to reach all sales and secure a certain percentage thereof,—a method commonly pursued in respect of license and occupation taxes. Pullman Co. v. Knott*, decided at the present term (235 U. S. 23, ante, 105. 35 Sup. Ct. Rep. 2.)

"*A tax upon a merchant's, manufacturer's, or miner's gross sales is not the same thing as one on his stock treated as property. Cooley*, Taxn. 3d Ed., p. 1095. The former is upon his business. In effect, the Oklahoma act prescribes an occupation tax (*Ohio Tax Cases*, 232 U. S. 576, 592, 58 L. Ed. 738, 745, 34 Sup. Ct. Rep. 372)."

This decision is decidedly adverse to the contention of plaintiff in error that the tax provided for by Section

30 of the Act of 1869 is a tax on property and sustains the view of the Supreme Court of Illinois that it is a tax on business regulated by the amount of business done. The Oklahoma statute requires a return of gross receipts. The Illinois statute requires a return of net receipts. The Oklahoma statute requires the payment of two per cent of the gross receipts. The Illinois statute requires the payment of an amount arrived at by applying the annual property tax rate to the net receipts.

In *Meyer v. Wells Fargo & Co.*, 223 U. S. 298, (56 L. Ed. 445), an Oklahoma statute provided as follows:

“Every corporation hereinafter named shall pay the State a gross revenue tax, * * * which shall be in addition to the taxes levied and collected upon an *ad valorem* basis upon the property and assets of such corporation, equal to the per centum of the gross receipts hereinafter provided, if such public service corporation operate wholly within the State, and, if such public service corporation operate partly within and partly without the State, it shall pay a tax equal to such proportion of said per centum of its gross receipts as the portion of its business done within the State bears to the whole of its business.”

The constitutionality of this tax being questioned it was contended in support of it that it was a tax on property, but the court said:

“We see no warrant for calling the tax a property tax. It is so similar to the Texas statute held bad in *Galveston, H. & S. A. R. Co. v. Texas*, 210 U. S. 217, 52 L. Ed. 1031, as to show that if one is not copied from the other they have a common source. It would be possible only by some extraordinary turn of ingenuity to sustain this after condemning that.

“It was argued in some detail that taking into account the rest of the act and other statutes passed later at the same session, this really was a property tax. But the scope and purport of the act, so far as it affects express companies, are too obvious to admit of such a view. The tax is ‘in addition to the taxes levied and collected upon an *ad valorem* basis.’”

In the instant case the tax provided for by Section 30 of the Act of 1869, although not there expressly declared to be so is, in effect, one "in addition to the taxes levied and collected upon an *ad valorem* basis." This is rendered free from all doubt by Section 1 of the Privilege Act of 1919 (Appendix, *post*, pp. 98-99), which declares that the privilege tax is to be one, not in lieu of, but in addition to the property tax, the fire department tax, the fire marshal tax and the tax provided for by Section 30 of the Act of 1869. The foreign insurance company, if it owns any real estate or tangible personal property within the State on April 1st of any year will be taxed upon that property under the General Revenue Act upon an *ad valorem* basis. (Revenue Act of 1872, Sec. 1, Appendix, *post*, p. 88.) The tax provided for by Section 30 of the Act of 1869 does not purport to be in lieu of any kind of a tax excepting town and municipal licenses and also fire department taxes in excess of two per cent of the gross receipts of the company's agency. Hence it must be considered, not as a substitute for the regular real and personal property tax, but as a tax in addition thereto.

In *Pullman Company v. Knott*, 235 U. S. 23 (59 L. Ed. 105), a law of Florida imposed a tax on gross receipts of sleeping and parlor car companies. It was claimed that the tax was a property tax and not a license tax *because the payment of it was not made a condition of the right to do business, because another tax was imposed in terms for a license, and because the history of the law showed that for years it took the place of a property tax.* The court, nevertheless, sustained the tax.

The objections made to the tax in that case were substantially the same as those now put forward in the instant case.

In *Oliver Iron Mining Co. v. Lord*, 262 U. S. 172 (67 L. Ed. 930), the court considered a Minnesota statute which provided that

“Every person engaged in the business of mining or producing iron ore or other ores in this state shall pay to the State of Minnesota an occupation tax equal to six per cent of the valuation of all ores mined or produced, which tax shall be in addition to all other taxes provided for by law.”

The statute provided that the valuation should be ascertained by subtracting from the value of such ore at the place where the same was brought to the surface of the earth certain specified items of expense, the valuation to be made by the Minnesota Tax Commission. It was contended by the mining companies that the tax was a property tax, but the court said:

“We think the tax in its essence is what this act calls it—an occupation tax. It is not laid on the land containing the ore, nor on the ore after removal, but on the business of mining the ore, which consists in severing it from its natural bed and bringing it to the surface, where it can become an article of commerce and be utilized in the industrial arts. Mining is a well recognized business wherein capital and labor are extensively employed. This is particularly true in Minnesota. Obviously a tax laid on those who are engaged in that business, *and laid on them solely because they are so engaged*, as is the case here, is an occupation tax.”

We submit that the decisions to which we have thus referred conclusively establish that the tax provided for by Section 30 of the Act of 1869 is a business or privilege tax and not a property tax.

The tax is laid upon foreign fire, marine and inland navigation insurance companies solely because they are engaged in the fire, marine and inland navigation insurance business. They are singled out as the only subjects of it and are the only ones upon which the tax is im-

posed. It cannot, therefore, be anything else than an occupation or business tax.

Second. Section 1 of Article IX of the Constitution of Illinois provides as follows:

"The general assembly shall provide such revenue as may be needful by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property, such value to be ascertained by some person or persons, to be elected or appointed in such manner as the general assembly shall direct, but not otherwise; but the general assembly shall have power to tax * * * insurance, telegraph and express interests or business, vendors of patents, and persons owning and using franchises or privileges, in such manner as it shall from time to time direct by general law, uniform as to the class upon which it operates."

Similar provisions are contained in the constitutions of other states. They require that all property, excepting such as is by other provisions declared exempt, shall be valued and taxed. No property can be omitted. If, then, the net receipts of an insurance company are property, and are subject to taxation as other property according to value, the net receipts of every person and corporation must also be property and subject as such to taxation according to value. The net receipts of the railroad company, the merchant, the physician, the lawyer, the judge, the washer woman and the hod carrier must likewise be subject to the property tax. And if all *net* receipts are subject to this property tax why are not all gross receipts likewise subject to it?

The final result of the holding that net receipts or gross receipts were personal property would have to be that the court would declare invalid all taxation of gross receipts or net receipts on the ground either that the tax rate was different from the tax rate on other prop-

erty, or that the tax rate was computed upon a different basis of valuation from that applied in the case of other property.

Third. The fact that at an early date a tax on the gross receipts of a foreign insurance company was provided for in the General Revenue Act of the state regulating the assessment of property and the collection of taxes is of no importance so far as concerns its bearing upon the question whether the tax in question is a property tax or a privilege tax. The same is true with respect to *dicta* in the opinions of the Supreme Court of Illinois which, as plaintiff in error interprets them, seem to indicate that the court supposed that gross receipts and net receipts were personal property. The character of the tax cannot be determined by the name given it either in the statute or in an opinion of the State Court.

Choctaw, Oklahoma & Gulf R. R. Co. v. Harrison, 235 U. S. 292, 59 L. Ed. 234.

St. Louis Cotton Compress Co. v. Arkansas, 260 U. S. 346, 67 L. Ed. 297.

Fourth. The circumstance alluded to by plaintiff in error that the machinery used for the assessment and taxation of property is availed of to some extent in the ascertainment and collection of the tax in question is of no importance. Nor is it of any consequence that the tax is not uniform throughout the state or even the county and that the amount of the net receipts is entered upon the tax lists. Plaintiff in error contends that the amount thus entered plays a part in the determination of the general property tax rate which is not the case with privilege taxes generally. There is no warrant for any such contention. The General Revenue Act does not so provide. But even if it did it could not make that a property tax which is, and can be nothing else than, a business or privilege tax.

As this court has said in *Horn Silver Mining Company v. New York*, 143 U. S. 305 (36 L. Ed. 164):

"It (*i. e.* the State) may impose as a condition of the grant as well as also of its continued existence, the payment of a specific sum each year, or a portion of the profits or gross receipts of the corporation, and may prescribe such mode in which the sum shall be ascertained as may be deemed convenient and just."

As we have seen, the Illinois Constitution authorizes the general assembly to tax "insurance, telegraph and express interests or business * * * and persons owning or using franchises or privileges in such manner as it shall from time to time direct by general law uniform as to the class upon which it operates." In exercising this power, it is clear, the general assembly may, in its discretion, employ the whole or any part of the machinery used in the taxation of real and personal property, that is suitable for the ascertainment of the amount of the privilege tax and for its collection. The general assembly has deemed it convenient and just that the amount to be paid by the foreign insurance company shall be ascertained in the manner indicated in said Section 30 and that is the end of the matter. This court cannot interfere with the exercise by the legislature of its discretion.

Fifth. The Supreme Court of Illinois has declared that the tax provided for by Section 30 of the Act of 1869 must be computed upon the full amount of the net receipts without debasement or equalization. That decision, as plaintiff in error concedes, being a construction of a state statute, is binding upon this court, as well as is its decision that Section 30 is not in conflict with the Illinois Constitution.

Clement National Bank v. Vermont, 231 U. S. 120, 58 L. Ed. 147.

Truax v. Corrigan, 257 U. S. 312, 66 L. Ed. 254.

That constitution requires that property taxation shall be by valuation "so that every person and corporation shall pay a tax in proportion to the value of his, her or its property, such value to be ascertained by some person or persons to be elected or appointed." Hence it results that whatever may be the law in other jurisdictions, the law of Illinois is that the net receipts of an insurance company or of any other company are not personal property, and a tax upon them cannot be a property tax. This follows from the fact, as declared by the Supreme Court of Illinois, that there is no valuation of them "by some person or persons to be elected or appointed."

Decisions of state courts are cited by plaintiff in error to the effect that if the method of levying a tax on gross receipts was that employed in the assessment and taxation of property, the tax on such gross receipts must be regarded as a property tax.

In *Thompson v. McLeod*, 112 Miss. 383, 73 So. 193, the tax was declared by the statute to be a privilege tax imposed upon "the business of extracting turpentine from standing trees." The court held that it applied to the owner of land who used his own property and that the tax, being upon what he derived from the use of the property, was the same thing as a tax upon the property itself. It did not question the right to impose privilege taxes as a condition precedent to the right to do business within the state. There was a well reasoned dissenting opinion in which it was held that the tax was not a property tax but a privilege tax.

In *Phoenix Fire Insurance Company v. City of Omaha*, 23 Nebraska 312, the tax was upon the gross premiums of every insurance company. The law required the listing of the premiums for the year *terminating at the date of the annual assessment of property for general taxa-*

tion and required the company's agent, at his peril, to retain in his possession a sufficient amount of the premiums to pay the taxes. The court held that the words "taxable property," or "property taxable according to the laws of this state" were used in the statute in the sense of taxable or subjects of taxation and embraced everything liable to taxation.

In the instant case the premiums listed are not for the year terminating at the date of the annual assessment nor is the agent made liable for the payment of the tax. The tax, as found by the court in *Hanover Fire Insurance Company v. Carr*, 317 Ill. 366, is a liability of the company.

In *New York Life Insurance Company v. Bradley*, 83 S. C. 418 (65 S. E. 433), the company's agent was required to return annually to the county auditor the gross receipts of the agency, "including all notes, accounts and other things received or agreed upon as compensation for insurance at such agency, together with all the value of any personal property of said company situated at such agency." The company was charged with the taxes on the amount so returned and the agent was declared personally responsible therefor and was authorized to retain in his hands a sufficient amount of the company's assets to pay the same. The court, in holding that the tax was invalid, announced the following conclusions:

1. The court held that the payment of the tax was not made a condition of entering the state nor was a failure to pay the tax made a ground of forfeiture of the privilege of doing business. The court held that had such been the requirement the tax would have been a privilege tax. In the instant case, however, as the Supreme Court of Illinois points out in *Hanover Fire Insurance Company v. Carr*, 317 Ill. 366, the payment of the tax is one of "the requisitions of the act" and the

failure to pay it requires a withholding of the certificate of authority to transact business.

2. The court held that there was another statute providing for license tax, the non-payment of which resulted in the forfeiture of the company's right to do business. In the instant case there is also a separate license or privilege tax, but the Act of 1919 which provides for that tax expressly declares that it shall not prevent the collection of the tax provided for by Section 30 of the Act of 1869.

3. The court held that that which was taxed was not limited to the money in the state owned by the foreign insurance company on the date on which the property was to be entered, and said:

"The power of the state to tax property is limited to property within its own borders. Manifestly it cannot tax, as property within the state on the 1st day of January, money which had passed out of the state during the preceding year. On this ground the tax must be held unconstitutional, as the taking of property without due process of law."

The reasoning of the court would have been much better had it sustained the tax on the ground that the fact that the gross receipts were not within the state made it clear that the tax was not intended to be a property tax, but was intended to be an occupation tax.

In *Parker v. North British & Mercantile Insurance Co.*, 42 La. An. 428 (7 So. 599), the court recognized that the tax might be valid if imposed in proper terms as a license, but held it invalid because it was "levied as a tax, assessed as a tax, claimed as a tax by the tax collector under proceedings provided exclusively for the collection of taxes." Thus the court held that while the State had power to exact from the company the same amount of money and payable at the same time and to the same officer as was provided for by the law then in

question, it could not exact it if it failed to observe certain forms which could have no possible effect upon the amount the defendant was required to pay.

“Things which are equal to the same thing are equal to each other” is an axiom shown to be good in mathematics. Why shouldn’t it be held good in law and applicable to controversies between litigants?

However, the fact that the conclusions arrived at by the courts of other states differed from those arrived by the Supreme Court of Illinois would be unimportant even if there were no substantial differences in the facts upon which the respective conclusions were founded. This court is not bound by the conclusions of other courts. It cannot well hold the tax in question to be a tax on property without disregarding its own repeated decisions.

V.

Whether the tax in question is a privilege tax or a property tax is immaterial.

If we assumed the tax provided for by Section 30 of the Act of 1869 to be a property tax what difference would that make so far as the case presented to this court is concerned? This court has nothing to do with the question whether the statute violates the State Constitution. That it does not is settled conclusively by the decision of the Supreme Court of Illinois.

The State, being at liberty to exclude the Hanover Company from transacting business within its borders, may, if it chooses to permit the company to enter the state and transact business, fix the price the company must pay for the privilege. Whether the price is reasonable or unreasonable makes no difference. Neither does it make any difference in what manner the price is fixed or when or how it is made payable.

What, then, is there to hinder the State from providing that if a foreign corporation, such as the Hanover Company, carries on business within the borders of the state it shall pay a tax upon the real and personal property which it owns within the state twice as high as that which a domestic corporation is required to pay upon its property or pay a tax upon a species of property upon which other persons are not required to pay taxes? The State Constitution might prevent such a tax, but the Fourteenth Amendment would not.

As this court said in *Horn Silver Mining Co. v. New York*, 143 U. S. 305 (36 L. E. 164), in answer to the contention that the statute there in question was to be treated as a tax law, and not as a license to the corporation for permission to do business in the state:

“Conceding such to be the case we do not perceive how it in any respect affects the validity of the tax. However, it may be regarded it is the condition upon which a foreign corporation can do business in the state, and in doing such business it puts itself under the law of the state, however that may be characterized.”

And as this court said in *Cheney Brothers Company v. Massachusetts*, 246 U. S. 147 (62 L. E. 632):

“A state may impose a different rate of taxation upon a foreign corporation for the privilege of doing business within the state than it applies to its own corporations upon the franchise which the state grants in creating them.”

If the amount of money the foreign corporation is required to pay is a matter entirely within the discretion of the state, what difference can it possibly make what process is availed of to fix the amount of the tax?

The maxim:

“Things which are equal to the same thing are equal to each other”

is here applicable.

The sum of \$10,000 arrived at by one method of computation is the same thing as \$10,000 arrived at by another method of computation.

In *Maine v. Grand Trunk R. Co.*, 142 U. S. 217 (35 L. E. 994) the court says:

"The character of the tax, or its validity, is not determined by the mode adopted in fixing the amount for any specific period or the times of its payment. The whole field of inquiry into the extent of revenue from sources at the command of the corporation is open to the consideration of the state in determining what may be justly exacted for the privilege."

In *Home Insurance Company v. New York*, 134 U. S. 594 (33 L. E. 1025) the court, in dealing with a franchise tax say:

"The validity of this tax can in no way be dependent upon the mode which the state may see fit to adopt in fixing the amount for any year which it shall exact for the franchise. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privilege it bestows."

VI.

The decision of the Supreme Court of Illinois that the tax provided for by Section 30 of the Act of 1869 is required to be extended against the entire amount of net receipts, being the construction of a statute of that state, is binding upon this court and furnishes no ground of relief to the complainant.

Prior to the decision in *People v. Kent*, 300 Ill. 324, there were no decisions of the Supreme Court of Illinois placing a construction upon Section 30 of the Act of 1869 with respect to the fixing of the amount of net receipts against which the tax there provided for was

to be extended. In the opinions in the following cases, however, there had been expressions which, according to the claim of plaintiff in error, indicated that the court assumed that the net receipts were to be debased and equalized and the tax was to be extended upon the debased and equalized amount.

Walker v. City of Springfield, 94 Ill. 364.

City of Chicago v. Phoenix Insurance Co., 126 Ill. 276.

National Fire Ins. Co. v. Hanberg, 215 Ill. 378.

People v. Cosmopolitan Ins. Co., 246 Ill. 442.

But in neither of these cases was the question argued or presented for *decision*. In *People v. Kent*, 300 Ill. 324, for the first time it became necessary for the court to decide it and it did decide that the tax must be extended against the full amount of net receipts. This decision of the court, which was rendered in December, 1921, was adhered to after the presentation of a petition for a rehearing. It was again presented and decided in *People v. Barrett*, 309 Ill. 53, and finally in *Hanover Fire Insurance Company v. Carr*, 317 Ill. 366, in both of which cases petitions for a rehearing were filed and the question was thoroughly argued and the following authorities were brought to the court's attention by plaintiff in error:

People v. Weaver, 100 U. S. 539, 25 L. Ed. 705.
Pelton v. National Bank, 101 U. S. 143, 25 L. Ed. 901.

Boyer v. Boyer, 113 U. S. 689, 28 L. Ed. 1089.
Greene v. Louisville & Interurban R. R. Co., 244 U. S. 499, 61 L. Ed. 1280.

Ankeny v. Blakely, 44 Or. 78, 74 Pac. 485.

Bressler v. Wayne County, 32 Neb. 834, 40 N. W. 787.

Coventry Co. v. Assessors, 16 R. I. 240, 14 Atl. 877.

The dissenting opinion filed by Mr. Justice Duncan in *Hanover Fire Insurance Co. v. Carr*, 317 Ill. 366, shows that the question must have been considered very carefully by the court and that every argument was presented that could have been presented in favor of the position contended for by plaintiff in error.

Plaintiff in error does not now insist that the decision is not sound or that this court has the power to set it aside and disregard it. This court has no such power. The construction placed by a state court upon a state statute is binding and conclusive upon this court.

Truax v. Corrigan, 257 U. S. 312, 66 L. Ed. 254.

St. Louis Cotton Compress Co. v. Arkansas, 260 U. S. 346, 67 L. Ed. 297.

The sole contention of plaintiff in error now is that treating the decision as correct the result is that the *property* of plaintiff in error is assessed at its full value whereas the *property* of other tax-payers is assessed at one-third or less of its full value and that this results in denying to plaintiff in error the equal protection of the laws. In support of this contention it cites the following authorities:

Sioux City Bridge Co. v. Dakota, 260 U. S. 441, 67 L. Ed. 340.

Greene v. Louisville R. R. Co., 244 U. S. 499, 61 L. Ed. 1280.

American Tank Car Corporation v. Day, . . . U. S. . . ., 70 L. Ed. 239.

Myles Salt Co. v. Iberia Drainage District, 239 U. S. 478, 60 L. Ed. 392.

Cummings v. Merchants Nat. Bank, 101 U. S. 153, 25 L. Ed. 903.

Exchange Bank v. Hines, 3 Ohio St. 1.

People v. Purdy, 231 U. S. 373, 58 L. Ed. 274.

But, as we have already pointed out, (*ante*, p. 37), this is not a case of the assessment and taxation of property within the meaning of the provision of the Illinois Constitution which requires property to be valued and taxed according to value. A tax extended on net receipts or gross receipts is an excise, occupation or privilege tax and not a property tax. With reference to such a tax Section 1 of Article IX of the Constitution of Illinois provides as follows:

“The general assembly shall have power to tax peddlers, auctioneers, brokers, hawkers, merchants, commission merchants, showmen, jugglers, innkeepers, grocery keepers, liquor dealers, toll bridges, ferries, insurance, telegraph and express interests or business, vendors of patents, and persons owning or using franchises or privileges, *in such manner as it shall from time to time direct by general law, uniform as to the class upon which it operates.*”

In *Hanover Fire Insurance Company v. Carr*, 317 Ill. 366, 376, in reference to this clause of the Constitution, the court says:

“The power to tax insurance interests or business is expressly conferred by the second clause of Section 1 of Article IX of the constitution. That section also requires that the act of the General Assembly creating such tax shall operate uniformly as to the class to which it applies, and appellant argues that since domestic fire insurance companies make the same sort of contract, transact the same sort of business and are likewise doing business within the state, they belong to the same class as foreign fire insurance companies which have been permitted to come into the state, and that therefore a tax levied against the latter which the domestic fire insurance companies do not have to pay is not uniform, as required by the section of the constitution referred to. Counsel are in error in supposing that for purposes of taxation under this section of the constitution foreign and domestic insurance companies belong to the same class because they are doing the same kind of business within this state. There is no

reason why insurance companies may not be divided into classes, the very point of distinction in which shall be the domicile of such companies, *i. e.*, whether foreign or domestic. The levying of taxes upon foreign fire insurance companies and not upon domestic companies of the same character, as compensation for the right to do business, is not, therefore, an infraction of this provision of the constitution. *Hughes v. City of Cairo*, 92 Ill. 339; *Ducat v. City of Chicago*, *supra*; *Walker v. City of Springfield*, *supra*; *People v. Thurber*, *supra*; *Insurance Co. v. Bradley*, 83 S. C. 418."

Inasmuch, then, as the general assembly may tax "insurance * * * interests or business * * * in such manner as it shall from time to time direct by general law, uniform as to the class upon which it operates," and the general assembly has determined that the manner in which the class known as foreign fire, marine and inland navigation insurance companies shall be taxed is by applying the annual property tax rate to the full amount of their net receipts, it has not exceeded its power. It is for the general assembly of Illinois and not for this court to determine the manner in which the tax shall be imposed.

The argument of plaintiff in error on this point is based upon the erroneous theory that the payment of the tax provided for by Section 30 of the Act of 1869 is not one of the conditions upon which the foreign insurance company is permitted to come into the State of Illinois and transact business, whereas the Supreme Court of Illinois has expressly decided that it is. *Hanover Fire Insurance Company v. Carr*, 317 Ill. 376. That decision is binding upon this court. That being the nature of the tax, the fact that it is different from the taxes imposed upon domestic companies or individuals is immaterial.

The complaint made by plaintiff in error that for many years taxing officers construed Section 30 to re-

quire the net receipts to be valued, equalized and debased as other personal property is wholly without force. The Supreme Court of Illinois, in construing the statute, might have attached some weight to that practice, had it seen fit to do so, but it didn't. It construed the statute in *People v. Kent*, 300 Ill. 324, in *December, 1921*, whereas the tax now being contested was imposed upon plaintiff in error's net receipts for the year commencing *May 1, 1922, and ending April 30, 1922*. Plaintiff in error came into the State for that year with full notice of the construction the court had given the statute.

Apart from this there is no assignment of error upon the present record by which that construction of the statute is challenged. On the contrary plaintiff in error admits that this court is without power to overturn that construction, and that the sole question to be considered is whether Section 30 of the Act of 1869, as thus construed, violates the Fourteenth Amendment.

VII.

The Casualty Insurance Company Act does not operate to nullify Section 30 of the Act of 1869, the State having power to discriminate between the different classes of companies.

Casualty insurance companies, both domestic and foreign, are permitted by the Act of 1899 (Appendix, *post*, pp. 93-96) to engage in the following kinds of insurance, being a portion of the kinds which fire, marine and inland navigation insurance companies are permitted to engage in:

1. Sprinkler leakage insurance.
2. Crop and livestock insurance.
3. Explosion insurance.

4. Automobile insurance, including fire, explosion, transportation, theft and collision.

The net receipts of casualty companies from these kinds of insurance are not subject to the tax provided for by Section 30 of the Act of 1869, and it is contended that this circumstance renders that section obnoxious to the equal protection of the laws clause of the Fourteenth Amendment.

To this contention we submit the following answers:

First. The right of the state to discriminate between domestic companies and foreign companies, whether casualty companies or fire, marine and inland navigation insurance companies, is so clear and well settled that further discussion of it is unnecessary.

Northwestern Mutual Life Ins. Co. v. Wisconsin, 247 U. S. 132, 62 L. Ed. 1025.

Cheney Brothers Co. v. Massachusetts, 246 U. S. 147, 62 L. Ed. 632.

Ohio Tax Cases, 232 U. S. 576, 58 L. Ed. 737.

Armour Packing Co. v. Lacey, 200 U. S. 226, 50 L. Ed. 451.

Singer Sewing Machine Co. v. Brickell, 233 U. S. 304, 58 L. Ed. 974.

Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 46 L. Ed. 679.

Fort Smith Lumber Co. v. Arkansas, 251 U. S. 532, 64 L. Ed. 396.

Quong Wing v. Kirkendall, 223 U. S. 59, 56 L. Ed. 350.

Southwestern Oil Company v. Texas, 217 U. S. 114, 54 L. Ed. 688.

In the first of these cases the discrimination was in favor of, and, in the second, against the foreign company.

Second. The right of the state to discriminate between foreign casualty companies and foreign fire, marine and inland navigation insurance companies is equally clear. That the state can refuse to admit foreign fire, marine and inland navigation insurance companies on any terms cannot, of course, be disputed. Nor can it be disputed that it can admit casualty companies, if it sees fit, without exacting any compensation from them. Not being entitled to complain if it is absolutely excluded while the casualty company is admitted free of charge, the fire, marine and inland navigation company cannot complain if compensation is exacted from it for its admission, while the casualty company is admitted free.

The whole is greater than any of its parts and is the sum of all its parts. The right to exclude completely is greater than, and includes, the right to admit partially, or upon conditions.

Third. The Fourteenth Amendment does not compel the state to afford the equal protection of its laws to persons *without* its jurisdiction. Hence it may admit some foreign corporations and refuse to admit others, and one which is admitted upon specified conditions cannot complain that different conditions may be applied to others.

Fourth. Even if this court were permitted to inquire into the justice of the discrimination between foreign casualty companies and foreign fire, marine and inland navigation companies it would not be authorized to hold that it was so unjust and so unreasonable as to require that the law in question should be overturned. The general assembly of Illinois apparently concluded there were good reasons why foreign fire, marine and inland navigation insurance companies should pay a tax upon receipts from all the kinds of insurance they wrote and that those reasons did not apply to other companies which

wrote some of the same kinds of insurance. The record does not show the facts upon which the general assembly acted, and even if this court were authorized to consider the question of discrimination, it would not have before it the facts necessary to a decision whether the discrimination was or was not reasonable.

Fifth. The casualty insurance act was passed in 1899, or thirty years after the fire, marine and inland navigation insurance act had been in force. Fire, marine and inland navigation insurance companies did not acquire the right to insure against sprinkler leakage until 1905, nor to insure against loss to automobiles until 1919. Would it not be most extraordinary to hold that although Section 30 of the Act of 1869 was valid when it was passed it became invalid thirty or more years later because of the passage of other acts relating to other companies? Where is the authority for any such doctrine?

Sixth. If it be true that it was wrong for the general assembly to authorize casualty companies to engage in the same kind of insurance in which fire, marine and inland navigation insurance companies engaged in, does it follow that the latter companies can claim that Section 30 was entirely wiped out? If they objected to the tax on net receipts from these kinds of insurance why did they engage in them?

Seventh. While the complainant's bill alleges (Rec., 7-9) and the decree finds (Rec., 38-40) that the complainant has engaged in the four kinds of insurance in which casualty companies also engage and has received premiums therefrom constituting a large part of its receipts it is nowhere alleged in the bill or found in the decree that these premiums have ever been returned for taxation under Section 30 of the Act of 1869, or that the amount of net receipts found by the Board of Review included any such receipts. As a matter of fact, which,

however, is not shown by the record, the complainant and other similar companies are claiming that such receipts are not required to be listed and taxed and the matter is now being litigated in the Supreme Court of Illinois in an action of mandamus entitled *People of the State of Illinois, ex rel. Attorney General v. Eugene Fay-art, et al.*

VIII.

The privilege tax act of 1919 does not affect Section 30 of the Act of 1869.

By Section 1 of the Act entitled "*An act in relation to the taxation of non-resident corporations, companies and associations for the privilege of doing an insurance business in this state,*" in force July 1, 1919, (Laws of 1919, p. 632, *Post*, pp. 98-99), all foreign insurance companies licensed and admitted to do business in the state were required to "pay an annual state tax for the privilege of doing an insurance business in this state equal to two per cent on the gross amount of premiums received during the preceding calendar year on contracts covering risks within this state."

The Hanover Company contends that the payment of this tax entitled it to come into the state and transact business and that, having thus come into the state, it was entitled to the same treatment as that accorded to Illinois insurance companies doing the same kind of business. In answer to this claim we submit the following:

First. The concluding sentence of Section 1 of the Act of 1919 shows that the two per cent gross receipts privilege tax was intended, not as a substitute for that provided for by Section 30 of the Act of 1869, but as an addition thereto. That sentence is as follows:

"But this act shall not be construed to prohibit the levy and collection of any state, county or muni-

cipal taxes upon the real and personal property of such corporations, companies and associations, nor to prohibit the levy and collection of taxes for the benefit of organized fire departments in cities and villages, nor to prevent the levy and collection of taxes for the purpose of maintaining the office of the Fire Marshall of this state and paying the expenses incident, *nor prevent the levy and collection of the tax authorized by Section 30 of an act entitled 'An act to incorporate and to govern fire, marine and inland navigation insurance companies doing business in the State of Illinois,' approved March 11, 1869, in force July 1, 1869, as amended.'*

Thus, there is clearly expressed the legislative intent that the Act of 1919 was not to affect Section 30 of the Act of 1869, but that the provisions of said Section 30 were to remain still in force.

The effect of the Act of 1919 was the same as if Section 1 had read as follows:

"Section 1. Be it enacted by the People of the State of Illinois represented in the general assembly: That all non-resident corporations, companies and associations licensed and admitted to do an insurance business in this state shall, except as herein otherwise provided, pay an annual state tax for the privilege of doing an insurance business in this state equal to two per cent on the gross amount of premiums received during the preceding calendar year on contracts covering risks within this state . . . and in addition thereto every agent of a fire, marine and inland navigation insurance company incorporated by the authority of any other state or government shall return to the proper officer of the county, town or municipality in which the agency is established, in the month of May, annually, the amount of the net receipts of such agency for the preceding year, which shall be entered on the tax lists of the county, town or municipality, and subject to the same rate of taxation for all purpose, state, county, town or municipal—that other personal property is subject to at the place where located."

The two acts thus combined into one would have provided two forms of compensation for the privilege accorded foreign fire, marine and inland navigation insurance companies of transacting business within this State, and that is the construction placed upon the two acts by the Supreme Court of Illinois.

In dealing with the Act of 1919 the Supreme Court of Illinois (*Hanover Fire Insurance Co. v. Carr*, 317 Ill. 366, 375), said:

"While the Act of 1919 entitled 'An Act in relation to the taxation of non-resident corporations, companies and associations for the privilege of doing an insurance business in this State,' approved June 28, 1919, (Laws of 1919, p. 626), imposes an annual State tax equal to two per cent on the gross amount of premiums received by any foreign insurance company during the preceding year, less certain specified deductions, for the privilege of doing business in this State, that fact does not show that the tax imposed upon the business of fire insurance by Section 30 is not likewise a tax for the privilege of doing business. The Act of 1919 requires that the tax be levied and paid to the State. Section 30 requires that the tax be apportioned among the State and the different municipalities of the situs of the agency. A valid reason is seen for this distribution of the tax. The foreign fire insurance company takes its net profits largely from the vicinity of its agency, and it is but just that it return to the municipality in which its agency is located something in lieu of the taxes that would otherwise be realized from such net receipts as are taken away."

Surely the reasoning of the court is worthy of careful and respectful consideration.

Second. The imposition of a privilege tax does not require the use of any special form of words. A tax may be called a privilege tax and yet not in fact be one. On the other hand, a tax may be in fact a privilege tax though called by some other name. The nature of the

tax provided for by the Act of 1919 would not be at all changed by omitting from the title as well as from the body of the act the words "for the privilege of doing an insurance business in this State." To determine the character of a tax provided for by Section 30 of the Act of 1869, we must consider all the circumstances connected with it.

The tax in question is not imposed by the General Revenue Act which deals with the assessment and taxation of real and personal property. On the contrary, it is provided for in the very act by which the foreign fire, marine and inland navigation insurance companies secure the privilege of coming into the State. It formed a part of the scheme framed to admit them and enable them to transact business. The entire Act of 1869, so far as it relates to foreign insurance companies, constitutes a single scheme, the parts of which are connected together, and not a number of different and unconnected schemes. The Act, just as every other act, must be construed as a whole.

Third. The State is not bound to accord to foreign corporations, other than those engaged in interstate commerce and those which are instrumentalities of the United States government, the same treatment with respect to taxation that is accorded to domestic corporations doing the same kinds of business, unless they have secured the right to such treatment by contract with the State, or there are circumstances which estop the State from subjecting them to different treatment.

Horn Silver Mining Co. v. New York, 143 U. S. 305, 36 L. Ed. 164.

Cheney Brothers Company v. Massachusetts, 246 U. S. 147, 62 L. Ed. 632.

Baltic Mining Company v. Massachusetts, 231 U. S. 68, 58 L. Ed. 127.

Liverpool Insurance Co. v. Massachusetts, 10 Wall. 566, 19 L. Ed. 1029.

American Smelting & Refining Co. v. Colorado, 204 U. S. 103, 51 L. Ed. 393.

Southern Railway Co. v. Greene, 216 U. S. 400, 54 L. Ed. 563.

Fourth. The imposition of the tax provided for by Section 30 of the Act of 1869, even if it were a property and not a privilege tax, would be justified because of the difference between the property taxation of domestic corporations and the property taxation of foreign corporations.

Domestic fire, marine and inland navigation insurance companies in Illinois are assessed and taxed not only upon their real and personal property within the State, including choses in action, but also upon their capital stock, while foreign fire, marine and inland navigation insurance companies are taxed only on their real and personal property, if they have any, located in this State. They are not taxed upon their choses in action or upon their capital stock. (*Post*, pp. 88-90.)

Hence, while a company organized under the laws of Illinois must pay taxes, a foreign insurance company can transact its business within the State of Illinois without paying any tax such as Illinois corporations are required to pay, for a foreign insurance company need not own any real estate or any tangible personal property within the State. Therefore, it having no real or personal property which can be taxed and its capital stock not being subject to taxation, it can escape taxation under the General Revenue laws of the State completely. On the other hand, the company organized under the laws of Illinois, which must compete in business with the foreign company, cannot escape taxation. It is true

it might transact business within the State without owning any real estate or any tangible personal property, but it could not transact business without having cash on hand or in bank, choses in action and a capital stock upon all of which it must pay taxes.

If, therefore, plaintiff in error is right in its contention that Section 30 of the Act of 1869 is invalid because insurance companies organized under the laws of Illinois are not subjected to the tax provided for by that section, what would be said in reply to a claim by an insurance company organized under the laws of Illinois if it should assert it was denied the equal protection of the laws because its capital stock was taxed and the capital stock of foreign companies, which were its competitors, was not taxed?

In *Hanover Fire Insurance Co. v. Carr*, 317 Ill. 366, 367, the court, in dealing with this point, said:

“Foreign insurance companies have, or may have, in this State on April 1st, when assessments on personal property are made, practically nothing of value, while domestic fire insurance companies are assessed for all of their holdings, both real and personal, including their choses in action, little, if any, of which tax is paid by foreign insurance companies. If it were to be said that Section 30 violates the uniformity clause of the Constitution for the reason that foreign fire insurance companies, when admitted to this State, should not be required to pay any tax which domestic insurance companies do not pay, by the same token domestic insurance companies, which pay on all of their property, could justly complain that the revenue law as applied to them is invalid for the reason that it, in effect, does not apply to foreign insurance companies doing a like business in the State; because such companies by reason of the withdrawal of their net receipts, are able to escape all, or practically all, property taxation.”

Disregarding, then, subsequent legislation, none of which was adopted until 1899, we have simply two meth-

ods of taxation of fire, marine and inland navigation insurance companies. One of these methods was applied to Illinois corporations, they being taxed upon their real estate and tangible personal property located within the State, their choses in action and their capital stock. The other was applied to foreign corporations, they being taxed upon their real estate and tangible personal property within the State, if they had any, and upon their net receipts, but not upon their choses in action or upon their capital stock.

Either this division of fire, marine and inland navigation insurance companies into two classes,—domestic and foreign—was permissible or all the laws of the State relating to the taxation of those companies were invalid. That it was not forbidden by the Constitution of Illinois is conclusively settled by the decision of the court below, its construction of that constitution being binding upon this court.

Fifth. Inasmuch as Section 1 of the Act of 1919 expressly says that it shall not be construed to prohibit the collection of the tax provided for by Section 30 of the Act of 1869, it would be a strange result if it should be so construed. The General Assembly evidently wished Section 30 of the Act of 1869 to stand, and if to give effect to Section 1 of the Act of 1919 will not produce that result, the legislative intention must be given effect by treating Section 1 of the Act of 1919 as a nullity.

IX.

The dissenting opinion of Justices Thompson and Dunn is not supported by the authorities cited by them.

Justices Thompson and Dunn in their dissenting opinion (Pr. Trans. 57-58), say:

“A State has the right to prohibit a foreign insurance company from exercising any part or all of

its charter powers within its borders, to impose such terms and conditions upon its right to do business in the State as it may see fit, or to entirely exclude it from the State. (*Alpena Portland Cement Co. v. Jenkins & Reynolds Co.*, 244 Ill. 354; *Hartford Fire Insurance Co. v. City of Peoria*, 156 *id.* 420.) The privilege of doing an insurance business in this State accorded to a foreign corporation being distinct and different from the privilege accorded to a domestic corporation, the legislature, in fixing the tax on the privilege of doing business, has the power to place foreign corporations in one class and domestic corporations in another, (*Hughes v. City of Cairo*, 92 Ill. 339), and also to subdivide foreign corporations into different classes. (*Home Insurance Co. v. Swigert*, 104 Ill. 653.) On the other hand, in exercising its power to tax a business, the legislature is specifically required by section 1 of article 9 of our State constitution to tax 'by general law, uniform as to the class upon which it operates,' and, under the Fourteenth Amendment of the Federal Constitution the State cannot 'deny to any person within its jurisdiction the equal protection of the laws.' These provisions apply to a foreign corporation which has complied with all the conditions of admission prescribed by the State and which has been granted the privilege of engaging in business within the State. The law is settled that after a foreign corporation gets into the State its burdens shall be no more onerous than those of domestic corporations for exercising the same character of privileges. (8 Fletcher Cyc. of Corporations, sec. 5755; *Southern Railway Co. v. Greene*, 216 U. S. 400, 30 Sup. Ct. 287; *Security Savings and Loan Ass'n v. Elbert*, 153 Ind. 198, 54 N. E. 753.)"

This argument amounts in substance to this:

When a foreign corporation has once been admitted into a State the burdens imposed upon it can be no greater than those imposed upon domestic corporations of the same class. The Hanover Company was admitted into the State when it received from the Director of Trade and Commerce its certificate of authority to trans-

act business, and the tax provided for by the Act of 1869 was imposed afterwards. Hence, it results that the tax in question is in violation of the Fourteenth Amendment.

The weak spot in this argument is the circumstance that the tax was really *imposed* in 1869; that is, it was provided for by a law passed in 1869, long before the Hanover Company came into the State, although it was not *assessed or extended as a tax* until after the Hanover Company had come into the State and had transacted business. The authorities cited by the dissenting judges in support of their conclusion do not support it.

The case of *Southern Railway Co. v. Greene*, 216 U. S. 400, 54 L. Ed. 536, cited in the dissenting opinion, was a case of a foreign company engaged in inter-state commerce, which had come into the State in compliance with its laws and had therein acquired property of a fixed and permanent nature, such as railroad tracks and other property necessary for the operation of a railroad. This court held that the State could not thereafter, *by a new law*, impose upon the company an additional franchise tax for the privilege of doing business in the State when no such tax was imposed upon domestic corporations carrying on a precisely similar business.

Of course the rule of law thus announced can have no application to the case of a foreign corporation such as the Hanover Company, which has come into the State after the law has been passed and with full knowledge of its provisions, nor to the case of such a corporation which has not acquired, since coming into the State, property of a fixed and permanent nature which it cannot remove or dispose of without great loss. The case thus cited has been referred to and its application explained so repeatedly by this court that it need not be further discussed than by referring to a single decision.

In *Cheney Brothers Co. v. Massachusetts*, 246 U. S. 147, 62 L. Ed. 632, the company on being admitted to do business in the State had acquired two pieces of land in Boston and at large cost specially improved and adapted them for use. A subsequent change in the statute had made the excise tax more onerous than before without any corresponding change being made in the law relating to domestic corporations. Yet the court sustained the law on the ground that the State did not surrender or abridge its power to change and revise its taxing system and tax rates by merely licensing or permitting a foreign corporation to engage in local business and acquire property within its limits.

In *Fletcher Cyc. of Corporations*, sec. 5755, cited in the dissenting opinion of Justices Thompson and Dunn, it is said:

“The only constitutional requirement exacted by a State in extending to a foreign corporation the privilege of doing business in the State is that when the foreign corporation gets into the State its burdens shall be no more onerous than those of domestic corporations for exercising the same character of privilege.”

As support of this statement the author refers to *Greene v. Kentenia Corporation*, 175 Ky. 661, 194 S. W. 820, in which, in turn, *American Smelting & Refining Co. v. Lindsley*, 204 U. S. 105, 51 L. Ed. 393, is referred to as supporting authority. But in the latter case, as had been held by this court, the Smelting & Refining Company had come into the State of Colorado in pursuance of a law which amounted to a contract on the part of the State that the company should not be subjected to any greater liabilities, restrictions and duties than then were, or might thereafter be, imposed upon domestic corporations of like character. In reliance upon this contract the company entered the State in 1899 and

erected a plant at a cost of more than \$5,000,000 for the purpose of carrying on its business. In 1902 a new law was passed which exacted from the company an annual tax or license fee in double the amount of that imposed upon domestic corporations. The difference between that case and the instant case is apparent.

A foreign corporation such as the Hanover Company is regarded as coming into a State each year for the period covered by the license or certificate of authority to transact business issued by the director of trade and commerce. As is said in *Fire Association of Philadelphia v. New York*, 119 U. S. 110, 30 L. Ed. 342,

“It is within the State for any given year under such license and subject to the conditions prescribed by statute. The State, having power to exclude entirely, has the power to change the conditions of admission at any time for the future and to impose as a condition, a payment of a new tax or a further tax as a license fee. If it imposes such license fee as a prerequisite for the future, the foreign corporation, until it pays such license fee, is not admitted within the State or within its jurisdiction. It is outside, at the threshold, seeking admission, with consent not yet given.”

In the instant case the Hanover Company was within the State in pursuance of a license granted under two statutes, by one of which it was required to pay a tax called a privilege tax at the time of its commencing business for the year, and by the other of which it was required to pay at the end of a specified period a tax based upon its net receipts. If there had been no net receipts tax provided for in the statute when the company came into the State for the year covered by the license, and the State had then attempted to impose an additional tax for that year, a different question might be presented. In the instant case, however, the net receipts tax was not only provided for by a then existing statutory provi-

sion, but was also called to the attention of the Hanover Company in the later statute imposing the so-called privilege tax.

In *Security Savings and Loan Association v. Albert*, 153 Ind. 198, 54 N. E. 753, also cited in the dissenting opinion of Justices Thompson and Dunn, the court in its opinion said:

"The State may fix the terms on which foreign corporations may enter to do business. But, if a foreign corporation is permitted to enter, the validity of its contracts with citizens of this State must be determined by the rules that apply to the same contracts between citizens and domestic corporations. It will not do to say that a building and loan mortgage on lands in Madison County is in its nature non-usurious because given to an Indiana association of which the mortgagor was a member, and that the same mortgage is in its nature usurious because the association is a foreign one."

Plainly that decision has no bearing whatever upon the question whether the State of Illinois could not, in the act permitting the Hanover Company to come into the State and do business, require it to pay a tax such as provided for by Section 30 of the Act of 1869.

Justices Thompson and Dunn in their dissenting opinion (Pr. Trans. 58-59) also say:

"The Hanover Fire Insurance Company derives its receipts from premiums paid on policies issued on the following, among other, classes of insurance: (1) Fire, (2) lightning, (3) tornado, (4) navigation and transportation, (5) fire apparatus and damage by same, (6) crop and live stock, (7) explosions, and (8) automobile. Domestic insurance companies derive their receipts from identically the same classes of insurance business. Casualty companies, both domestic and foreign, write insurance covering four of the same classes, namely, fire apparatus, crop and live stock, explosion, and automobile. Unincorporated entities permitted by the laws of this State to do an insurance business under regulations pre-

scribed by law are engaged in the same insurance business as the incorporated companies mentioned in Section 30. In transacting the business of insurance, these four groups of persons or corporations are in direct competition with each other in this State, and under the authorities cited, all of them are entitled to the equal protection of the laws of this State. Every tax levied on the business of insurance under the limitation fixed by the second division of Section 1 of Article 9 of our Constitution, must be 'by general law, uniform as to the class upon which it operates.' An occupation tax on the business of insurance, to be valid, must operate alike upon all persons or corporations engaged in the same class of insurance business. Section 30, operating upon insurance companies incorporated by the authority of other States or governments and licensed to do business in this State, and not upon insurance companies incorporated under the laws of this State and other companies and persons doing identically the same class of insurance business, contravenes the Federal and State constitutions and is void."

We have already discussed this point in Division VII of our argument (*Ante*, pp. 56-60), and there is no need of repeating what we have there said.

X.

Every reasonable presumption must be indulged in favor of the validity of a statute when it is attacked as unconstitutional and it must be sustained unless its invalidity is clearly demonstrated.

Sweet v. Rechel, 159 U. S. 380, 40 L. Ed. 188.

Livingston County v. Darlington, 101 U. S. 407, 25 L. Ed. 1015.

Nicol v. Ames, 173 U. S. 509, 43 L. Ed. 786.

Buttfield v. Stranahan, 192 U. S. 492, 48 L. Ed. 534.

Powell v. Pennsylvania, 127 U. S. 685, 32 L. Ed. 256.

That the State has the power to put any price it sees fit upon the privilege of transacting business within its territory by a foreign insurance company follows as a necessary consequence from its power to exclude from its territory entirely every such company. The power to fix the price includes, of course, the power to prescribe when the price shall be paid, how it shall be paid, and the process by which the amount of it shall be ascertained.

If the State sees fit it can exact full payment in advance, payment in monthly installments, or payment in full at the end of the period of the privilege. It can require that the amount of the price shall be a certain percentage of the company's gross receipts, or a certain percentage of its net receipts, or that it shall be ascertained by applying the property tax rate for the year upon the gross receipts or the net receipts. It can provide that it shall be paid to the State Treasurer or to the County Tax Collector. It can provide that it shall be used exclusively for State purposes or that it shall be distributed among its various municipal corporations.

Without question the State had the right to exact as compensation from the Hanover Company as large an amount of money each year as that which would be produced by the method prescribed by Section 30 of the Act of 1869. The exaction of the amount, then, being constitutionally permissible, it would seem to be ridiculous to overturn the statute merely because the method prescribed for computing the amount might be regarded as not the most appropriate.

This court should concern itself solely with matters of substance and should permit the State legislature to exercise its own judgment as to matters of form. The

Fourteenth Amendment does not purport to regulate the style of laws enacted by a State. All it aims at is to prevent a State from exacting from a person within its jurisdiction more than it has power to enact.

Respectfully submitted,

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APPENDIX.

I.

ACT OF 1869 IN RELATION TO FIRE, MARINE
AND INLAND NAVIGATION INSURANCE COM-
PANIES.

The provisions of this Act as amended by subsequent acts, so far as they may have any bearing upon the validity of Section 30, which provides for the tax now in question, are contained in Sections 1, 1a, 22 and 30. They provide as follows:

“An Act to incorporate and to govern fire, marine and inland navigation insurance companies doing business in the State of Illinois, approved and in force March 11 and July 1, 1869, (Laws of 1869, p. 209), as amended by subsequent acts (Laws of 1879, p. 178; Laws of 1881, p. 99; Laws of 1889, p. 246; Laws of 1899, pp. 176, 246; Laws of 1905, p. 290; Laws of 1912, p. 45; Laws of 1919, p. 613).

SECTIONS 1 AND 1A.

Section 1. WHO MAY FORM CORPORATION—PURPOSES.) *Be it enacted by the People of the State of Illinois represented in the General Assembly, That any number of persons, not less than thirteen (13) may associate and form an incorporated company for the following purposes, to-wit: To make insurance on dwelling houses, stores, and all kinds of buildings, and upon household furniture and other property, against loss or damage by fire, lightning and tornadoes, or either or any of said causes and the risks of inland navigation and transportation. Any and all insurance companies heretofore or hereafter incorporated under the provisions of this Act, which shall, in the declaration and charter provided to be filed, have expressed an intention to make in-*

insurance, or shall have power to make insurance against loss or damage by the risks of inland navigation or transportation, shall have power to make insurance upon vessels, boats, cargoes, goods, merchandise, freights, and other property, against loss and damage by all or any of the risks of ocean, lake, river, canal and inland navigation and transportation, and against loss or damage by explosion, whether fire ensues or not, except upon steam boilers and pipes, fly wheels, engines and machinery connected therewith or operated thereby.

Section 1-a. INSURANCE OF MOTOR VEHICLES.) That all insurance companies authorized to transact the business of fire, marine or inland navigation insurance in this State, may, in addition to the business which they are now authorized by law to do, insure automobiles or other motor vehicles, whether stationary or being operated under their own power, against all or any of the risks of fire, lightning, wind storm, tornadoes, cyclones, explosions, hail storms, transportation by land or by water, theft and collision, upon filing with the Insurance Department of the State of Illinois official notification of their purpose so to do: *Provided*, the same shall be clearly expressed in the policies."

(NOTE. As originally adopted in 1869 the Act gave fire, marine and inland navigation insurance companies only the following powers:

To make insurance on dwelling houses, stores and all kinds of buildings and upon household furniture and other property, against loss or damage by fire, and the risks of inland navigation and transportation, and also to make insurance upon vessels, boats, cargoes, goods, merchandise, freight and other property against loss and damage by all or any of the risks of lake, canal and inland navigation and transportation.

By amendatory acts the following additional powers were given:

The power to insure against loss or damage by lightning was added by the Act of 1879.

The power to insure against loss by tornadoes was added by the Act of 1881. Section 1a was added by the Act of 1912.

The power to insure vessels, boats, cargoes, goods, merchandise, freight and other property against loss and damage by all or any of the risks of ocean, and against loss or damage by explosion, whether fire ensues or not, except upon steam boilers and pipes, fly wheels, engines, and machinery connected therewith or operated thereby were added by the Act of 1919.

These powers were also added to by separate independent acts, not purporting to be amendatory, which acts were as follows:

"An Act authorizing fire insurance companies to insure against loss or damage by lightning, wind storms, hail storms and tornadoes and cyclones. In force July 1, 1885. (Laws of 1885, p. 209.)

Section 1. LIGHTNING AND TORNADO INSURANCE PERMITTED.) *Be it enacted by the People of the State of Illinois represented in the General Assembly, That all insurance companies heretofore organized under any law or laws of the State of Illinois, having power to make insurance against loss by fire, are hereby authorized to insure houses, buildings, growing crops, live stock, and other property against loss or damage by lightning, wind storms, hail storms, tornadoes and cyclones, or either or all of them: Provided, the same shall be clearly expressed in the policies."*

"An Act authorizing fire insurance companies to insure sprinklers, pumps or other fire apparatus, and also to insure against loss or damage by the same. In force July 1, 1905. (Laws of 1905, p. 290.)

Section 1. FIRE PREVENTION APPARATUS MAY BE INSURED—INSURANCE AGAINST DAMAGES BY:) *Be it enacted by the People of the State of Illinois represented in the General Assembly, That all insurance companies authorized to transact fire insurance business in this State may, in addition to the business which they are now authorized by law to do, insure sprinklers, pumps, and other apparatus, erected,*

used or put in position for the purpose of extinguishing fires, against damage or loss or injury resulting from any cause whatsoever; and may also insure any property which such companies are authorized to insure against loss or damage by fire, against damage, loss or injury by water or otherwise, resulting from the breaking of or injury to such sprinklers, pumps or other apparatus, or from the use or operation of the same, arising from any cause whatever, upon filing with the Insurance Department of the State of Illinois official notification of their purpose so to do: Provided, the same shall be clearly expressed in the policies."

The foregoing provisions of Sections 1 and 1a of the Act of 1869 as amended, together with the subsequent separate and independent acts, express all the powers of insurance granted to fire, marine and inland navigation insurance companies which were in force during the year commencing May 1, 1922, and ending April 30, 1923.)

SECTION 22.

"Section 22. FOREIGN COMPANIES — ASSETS — AGENTS—SERVICE OF PROCESS.) It shall not be lawful for any insurance company, association or partnership incorporated by or organized under the laws of any other state of the United States, or any foreign government, for any of the purposes specified in this act, directly or indirectly, to take risks or to transact any business of insurance in this State unless possessed of the amount of actual capital required of similar companies formed under the provisions of this act; nor shall it be lawful for any mutual insurance company of any other state to transact any kind of business within this State other than that prescribed by section 13 of this Act, unless said company is possessed of an amount of cash assets over and above all liabilities, including re-insurance reserve equal to the amount of capital stock required of stock companies; and any such company desiring to transact any such business as aforesaid by any agent or agents in this State, shall first appoint an attorney in this State on whom process of law can be served, and file in the office of the insurance su-

perintendent a written instrument duly signed and sealed, certifying such appointment, which shall continue until another attorney be substituted, and in case of death or removal of said attorney so designated by said company, service of any process from any court in this State on the superintendent of insurance during such vacancy shall be sufficient until said company shall appoint another attorney, as required by this act; and any process issued by any court of record in this State and served upon such attorney by the proper officer of the county in which such attorney may reside, or may be found, shall be deemed a sufficient service of process upon such company, but service of process upon such company may also be made in any other manner provided by law.

“SERVICE AFTER COMPANY STOPS BUSINESS.) In case any insurance company not incorporated in this State shall cease to transact business in the State according to the laws thereof, the agents last designated or acting as such for such corporation, shall be deemed to continue agents for such corporation for the purpose of serving process for commencing action upon any policy or liability issued or contracted while such corporation transacted business in this State, and service of such process for the cause aforesaid upon any such agent, shall be deemed a valid personal service upon such corporation.

“CERTIFIED COPY OF CHARTER—STATEMENT.) And every such company, association or partnership shall also file a certified copy of their charter or deed of settlement, together with a statement, under the oath of the president or vice-president or other chief officer and secretary of the company for which he or they may act, stating the name of the company and place where located, the amount of its capital, with a detailed statement of its assets, showing the amount of cash on hand, in bank or in the hands of agents, the amount of real estate and how the same is incumbered by mortgage, the number of shares of stock of every kind owned by the company, the par and market value of the same, amount loaned on bond and mortgage, the amount loaned on other security, stating the kind and the amount loaned

on each, and the estimated value of the whole amount of such securities; any other assets or property of the company, also stating the indebtedness of the company, the amount of losses adjusted and unpaid, the amount incurred and in process of adjustment, the amount resisted by the company as illegal and fraudulent, and all other claims existing against the company; also a copy of the last annual report, if any, made under any law of the state by which said company was incorporated, and no agent shall be allowed to transact business for any such company whose capital (or if a mutual company whose re-insurance reserve as required in section 13 of this act) is impaired to the extent of twenty per cent thereof, which such deficiency shall continue.

“DEPOSIT.) And any company incorporated by or organized under any foreign government shall, in addition to the foregoing, deposit with the insurance superintendent for the benefit and security of policyholders residing in the United States, a sum not less than two hundred thousand dollars (\$200,000), in stocks of the United States, or of the State of Illinois, in all cases to be equal to a stock producing six per cent per annum—said stocks not to be received by said insurance superintendent at a rate above their par value, or above their current market value—or in bonds and mortgages on improved unincumbered real estate in the State of Illinois, worth fifty per cent more than the amount loaned thereon.

“EXCHANGE OF SECURITIES.) The stocks and securities so deposited may be exchanged from time to time for other securities as aforesaid.

“INTEREST—FEES.) And so long as the company so depositing shall continue solvent, and comply with the laws of this State, such company or association may be permitted by the said insurance superintendent to collect the interest or dividends on said deposits; and where a deposit is made of bonds and mortgages, accompanied by full abstracts of title and searches, the fees for an examination of title by counsel, to be paid by the party making the deposit, shall not exceed twenty dollars for each mortgage, and the fee for an appraisal of property shall be five dollars to each appraiser, not exceeding two, besides expenses for mortgage.

"CERTIFICATES OF AUTHORITY.) Nor shall it be lawful for any agent or agents to act for any company or companies referred to in this section, directly or indirectly, in taking risks or transacting the business of fire and inland navigation insurance in this State, without procuring annually from the insurance superintendent, a certificate of authority, stating that such company has complied with all the requisitions of this act which apply to such companies, and the name of the attorney appointed to act for the company.

'STATEMENT RENEWED YEARLY.) The statement and evidences of investments required by this section shall be renewed from year to year, in such manner and form as may be required by said insurance superintendent, with an additional statement of the amount of premiums received and losses incurred in the State during the preceding year, so long as such agency continues, and said insurance superintendent, on being satisfied that the capital, securities and investments remain secure, as hereinbefore provided, shall furnish a renewal of the certificate as aforesaid.

"PENALTIES.) Any violation of any of the provisions of this act shall subject the party violating the same to a penalty not exceeding five hundred dollars for each violation, and of the additional sum of one hundred dollars for each month during which any such agent shall neglect to file such affidavits and statements as are herein required.

"ADVERTISEMENTS OF AGENCY.) Every agent of any insurance company shall, in all advertisements of such agency, publish the location of the company, giving the name of the city, town or village in which the company is located, and the State or government under the laws of which it is organized. The term 'agent' or 'agents' used in this section shall include an acknowledged agent, surveyor, broker or any other person or persons who shall in any manner aid in transacting the insurance business of any insurance company not incorporated by the laws of this State.

"SECTION APPLIES TO ALL FOREIGN COMPANIES.) The provisions of this section shall apply to all foreign companies, partnerships, associations and individuals, whether incorporated or not. All insurance

companies, associations or partnerships, incorporated by or organized under the laws of any other state of the United States, or any foreign government, transacting the business of fire or marine insurance, or any other kind of insurance in this State, shall make annual statements of their condition and affairs to the insurance superintendents' office, in the same manner and in the same form as similar companies organized under the laws of this State.

"PENALTY FOR NEGLECT TO MAKE ANNUAL STATEMENT.) In case of neglect or refusal to make such annual statement as aforesaid, all persons acting in this State as agents or otherwise in transacting the business of insurance for said companies, corporations, associations, partnerships or individuals, shall be subject to the same penalties provided by law in case of the failure of any insurance company organized under the laws of this State to make an annual statement as provided in this act.

"ANNUAL STATEMENTS, WHEN FILED.) Foreign insurance companies shall be required to make and file their annual statements and evidences on the first day of January in each year, or within thirty days thereafter, made out for the year ending on the preceding 30th of September. The supplementary annual statements of their business and affairs in the United States, duly verified by the resident manager of such company, shall be filed in the month of January of each year, made out for the year ending the 31st day of December immediately preceding."

"Section 22½. REVOCATION OF CERTIFICATE BY AUDITOR: If the Auditor has or shall have at any time satisfactory evidence that any annual statement or other report required or authorized by this Act, made or to be made by any officer or officers, agent or agents of any corporation, association or partnership, incorporated by or organized under the laws of any State of the United States or any foreign government, is false, it shall be the duty of said Auditor to immediately revoke the certificate of authority granted on behalf of such corporation, association or partnership, and mail a copy of such revocation to each agent thereof in this State. And the agent or agents of such cor-

poration, association or partnership, after such notice, shall discontinue the issuing of any new policy and the renewal of any policy previously issued; and such revocation shall not be set aside nor any new certificate of authority given until satisfactory evidence shall have been furnished to said Auditor that such corporation, association or partnership is in substance and in fact in the condition set forth in such false statement or report, and that all the requirements of said Act are fully complied with." (Act of March 11, 1869, this section being added in 1877.)

"Section 23. It shall be the duty of the insurance superintendent, whenever he shall deem it expedient so to do, in person, or by one or more persons to be appointed by him for that purpose, not officers or agents of, in any manner interested in any insurance company doing business in this State, except as policyholders, to examine into the affairs of any insurance company incorporated in this State, or doing business by its agents in this State; and it shall be the duty of the officers or the agents of any such company doing business in this State, to cause their books to be opened for inspection of the insurance superintendent, or the person or persons so appointed, and otherwise to facilitate such examinations, so far as it may be in their power to do, and to pay all reasonable expenses incurred therein, and for that purpose the said insurance superintendent, or person or persons so appointed by him, shall have the power to examine under oath, the officers and agents of any company relative to the business of said company; and whenever the said insurance superintendent shall deem it for the best interest of the public so to do, he shall publish the result of such investigation in one or more papers of this State.

"And whenever it shall appear to the said insurance superintendent from such examination, that the assets of any company incorporated in this State are insufficient to justify the continuance in business of any such company, he may direct the officers thereof to require the stockholders (or if a mutual company the members thereof) to pay in the amount of such deficiency within such periods as he may

designate in such requisition; or he may apply to the circuit court of the county in which the principal office of said company shall be located for an order requiring them to show cause why the business of such company shall not be closed, and the court shall thereupon proceed to hear the allegations and proofs of the respective parties; and in case it shall appear to the satisfaction of said court that the assets and funds of said company are not sufficient as aforesaid, or that the interests of the public so require, the said court shall decree a dissolution of said company and a distribution of its effects. The said circuit court shall have power to refer said application to a master in chancery to inquire into and report upon the facts stated therein. Any company receiving the aforesaid requisition from the said insurance superintendent shall forthwith call upon its stockholders for such amounts as will make its capital equal to the amounts fixed by the charter of said company; and in case any stockholder of such company shall refuse or neglect to pay the amount so called for, after notice personally given, or by advertisement, in such time and manner as the said insurance superintendent shall approve, it shall be lawful for the said company to require the return of the original certificate of stock held by such stockholder, and, in lieu thereof, to issue new certificates for such number of shares as the said stockholder may be entitled to, in the proportion that the ascertained value of the funds of the said company may be found to bear to the original capital of the said company—the value of such shares for which new certificates shall be issued, to be ascertained under the direction of the said insurance superintendent and the company paying for the fractional parts of shares; and it shall be lawful for the directors of such company to create new stock and dispose of the same, and to issue new certificates therefor, to an amount sufficient to make up the original capital of the company.

“And it is hereby declared that, in the event of any additional losses accruing upon new risks taken after the expiration of the period limited by the said insurance superintendent in the aforesaid requisition for the filling up of the deficiency in the cap-

ital of such company, and before said deficiency shall be made up, the directors shall be individually liable to the extent thereof.

“And if, upon examination, it shall appear to the said insurance superintendent that the assets of any company chartered on the plan of mutual insurance under this act are insufficient to justify the continuance of such company in business, it shall be his duty to proceed in relation to such company in the same manner as herein required in regard to joint stock companies, and the trustees or directors of such company are hereby made personally liable for any losses which may be sustained upon risks taken after the expiration of the period limited by said insurance superintendent for filling up the deficiency in the capital, and before such deficiency shall have been made up.

“Any transfer of stock of any company organized under this act, made during the pending of any such investigation, shall not release the party making the transfer from his liability for losses which may have accrued previous to the transfer.

“And whenever it shall appear to the said insurance superintendent from the report of the person or persons appointed by him, that the affairs of any company not incorporated by the laws of this State are in an unsound condition, he shall revoke the certificates granted in behalf of such company, and shall cause a notification thereof to be published in a newspaper of general circulation published in the City of Springfield, and mail a copy thereof to each agent of the company; and the agent or agents of such company, after such notice, shall be required to discontinue the issuing of any new policy and the renewal of any previously issued.”

“Section 27. FEES: There shall be paid by every company, association, person or persons, or agent, to whom this Act shall apply, the following fees: For filing the declaration or the certified copy of a charter herein required, the sum of \$30; for filing the annual statement required, \$10; for each certificate of authority to agents of companies or associations not incorporated under the laws of this State, \$2; for each certificate of authority to agents of companies incorporated under the laws of this State,

fifty cents; for every copy of paper filed in his office, the sum of twenty cents per folio; and for affixing the seal of said office to such copy and certifying the same, \$1; and in case two or more companies shall combine and effect insurance, under a joint policy, each and every company shall pay the fees provided herein, the same as if each company wrote separate and distinct policies: *Provided*, that the net amount of all fees over and above the cost of performing the clerical labor connected therewith shall not exceed, under this Act, the sum of \$5,000, and that any amount above that sum shall be paid over to the State Treasurer: *And, provided further*, that the Auditor shall render account, in his biennial report, of the fees received by him under the provision of this Act."

"Section 29. FOREIGN COMPANIES—RECIPROCITY: Whenever the existing or future laws of any state of the United States, or any other kingdom or country shall require of insurance companies incorporated by or organized under the laws of this State, and having agencies in such other State, kingdom or country, any deposit or securities in such State, kingdom or country, for the protection of policyholders or otherwise, of any payment for taxes, fines or penalties, certificates of authority, license fees or otherwise, greater than the amount required for such purposes from similar companies of other States by the then existing laws of this State, then and in every such case, all companies of such States, establishing or having heretofore established any agency or agencies in the State, shall be and are hereby required to make the same deposit, for a like purpose, with the Auditor of this State, and to pay to the Auditor, for taxes, fines, penalties, certificate of authority, license fees, and otherwise an amount equal to the amount of such charges and payments imposed by the laws of such State upon the companies of this State and the agents thereof: *Provided*, that the payment required of such foreign companies shall, in no case, be less than required by this Act."

SECTION 30.

“Section 30. FOREIGN COMPANIES—TAX ON NET RECEIPTS.) Every agent of any insurance company, incorporated by the authority of any other State or government, shall return to the proper officer of the county, town or municipality in which the agency is established, in the month of May, annually, the amount of the net receipts of such agency for the preceding year, which shall be entered on the tax lists of the county, town and municipality, and subject to the same rate of taxation, for all purposes—State, county, town and municipal—that other personal property is subject to at the place where located; said tax to be in lieu of all town and municipal licenses; and all laws and parts of laws inconsistent herewith are hereby repealed: *Provided*, that the provisions of this section shall not be construed to prohibit cities having an organized fire department from levying a tax, or license fee, not exceeding two per cent in accordance with the provisions of their respective charters, on the gross receipts of such agency, to be applied exclusively to the support of the fire department of such city.”

II.

“AN ACT PROVIDING A PENALTY FOR A VIOLATION OF SECTION 30 OF AN ACT ENTITLED ‘AN ACT TO INCORPORATE AND GOVERN FIRE, MARINE AND INLAND NAVIGATION INSURANCE COMPANIES DOING BUSINESS IN THE STATE OF ILLINOIS,’ APPROVED AND IN FORCE MARCH 11, 1869.”

“Section 1. UNLAWFUL FOR INSURANCE COMPANIES TO WRITE POLICIES UPON PROPERTY SITUATED IN THIS STATE EXCEPT THROUGH LEGALLY AUTHORIZED AGENTS: That it shall be unlawful for any insurance company legally authorized to transact business in the State of Illinois to write, place or cause to be written or placed any policy or contract for indemnity for insurance upon property situated or located in the State of Illinois except through le-

gally authorized agents in the State of Illinois, and the writing, placing or causing to be placed any such policy of insurance is hereby declared to be a violation of the law providing for the payment of taxes by foreign insurance companies doing business in the State of Illinois as provided in Section 30 of an act entitled 'An Act to incorporate and govern fire, marine and inland navigation insurance companies doing business in the State of Illinois,' approved and in force March 11, 1869."

III.

ACT OF 1872 FOR THE ASSESSMENT OF PROPERTY AND THE LEVY AND COLLECTION OF TAXES.

The provisions of this Act as amended by subsequent Acts, so far as they may have any bearing upon the validity of Section 30 of the Act of 1869 which provides for the tax in question, are contained in Sections 1, 7 and 32, and provide as follows:

"An Act for the assessment of property and for the levy and collection of taxes. In force July 1, 1872 (Laws of 1871-2 p. 1), as amended by subsequent Acts. (Laws of 1879, p. 251; Laws of 1905, p. 353.)

"Section 1. WHAT PROPERTY LIABLE TO TAXATION.) *Be it enacted by the People of the State of Illinois represented in the General Assembly, That the property named in this section shall be assessed and taxed except so much thereof as may be, in this act, exempted:*

"First. All real and personal property in this State.

"Second. All moneys, credits, bonds or stocks and other investments, the shares of stock of incorporated companies and associations, and all other personal property, including property *in transitu* to or from this State, used, held, owned or controlled by persons residing in this State.

"Third. The shares of capital stock of banks and banking companies doing business in this State.

"Fourth. The capital stock of companies and associations incorporated under the laws of this State, except companies and associations organized for purely manufacturing and mercantile purposes, or for either of such purposes, or for the mining and sale of coal, or for printing, or for the publishing of newspapers, or for the improving and breeding of stock."

"Section 7. PERSONALTY AT PLACE OF OWNER'S RESIDENCE.) Personal property, except such as is required in this Act to be listed and assessed otherwise, shall be listed and assessed in the county, town, city, village or district where the owner resides.

"(STOCK AT PLACE OF CORPORATE OFFICE.) The capital stock and franchises of corporations and persons, except as may be otherwise provided, shall be listed and taxed in the county, town, district, city or village wherein the principal office or place of business of such corporation or person is located in this State. If there be no principal office or place of business in this State, then at the place in this State where any such corporation or person transacts business."

"Section 32. LISTING CAPITAL STOCK, CORPORATIONS, ETC.) Bridges, express, ferry, gravel road, gas, insurance, mining, plank road, stage, steamboat, street railroad, transportation, turn-pike and all other companies and associations incorporated under the laws of this State, other than banks organized under any special or general law of this State, and companies and associations organized for purely manufacturing and mercantile purposes, or for either of such purposes, or for the mining and sale of coal, or for printing, or for publishing of newspapers, or for the improving and breeding of stock, shall in addition to other property required by this act to be listed, make out and deliver to the assessor a sworn statement of the amount of its capital stock, setting forth particularly:

"First. The name and location of the company or association.

"Second. The amount of capital stock authorized, and the number of shares into which such capital stock is divided.

"Third. The amount of capital stock paid up.

"Fourth. The market value, or if no market value, then the actual value of the shares of stock.

"Fifth. The total amount of all indebtedness except the indebtedness for current expenses, excluding from such expenses the amount paid for the purchase or improvement of property.

"Sixth. The assessed valuation of all its tangible property; such schedule shall be made in conformity to such instructions and forms as may be prescribed by the Auditor of Public Accounts. In all cases of failure or refusal of any person, officer, company or association to make such return or statement, it shall be the duty of the assessor to make such return or statement from the best information which he can obtain."

IV.

AN ACT ENTITLED "AN ACT TO ENABLE CITIES, TOWNS AND VILLAGES ORGANIZED UNDER ANY GENERAL OR SPECIAL LAW TO LEVY AND COLLECT A TAX OR LICENSE FEE FROM FOREIGN FIRE INSURANCE COMPANIES FOR THE BENEFIT OF ORGANIZED FIRE DEPARTMENTS." (THIS ACT BECAME A LAW MAY 31, 1895. IN FORCE JULY 1, 1895. L. 1895, P. 104; LEGAL NEWS ED., P. 69.)

Sec. 1. FOREIGN FIRE INSURANCE COMPANIES TO PAY TAX OR LICENSE FEES.) All corporations, companies and associations not incorporated under the laws of this State, and which are engaged in any city, town or village organized under any general or special law of this State in affecting fire insurance, shall pay to the treasurer of the city, town or village for the maintenance, use and benefit of the fire department thereof, a sum not exceeding two per cent of the gross receipts received by their agency in such city, town or village; and any city, town or village of less than fifty thousand inhabitants, having an organized fire department, shall cause to be passed an ordinance

providing for the election of officers of such organized fire department, by the department, which shall include a treasurer, and make all such rules and regulations in respect thereof and the management of said fund as may be needful; that in all such cities, towns or villages the treasurer shall pay such sum received from insurance companies to the treasurer of the fire department of the city, town or village in which it is collected. The treasurer of such fire department shall give a sufficient bond to the city, town or village in which such fire department is organized to be approved by the president of the village or mayor, as the case may be, conditioned for the faithful performance of his duties under the ordinance passed as aforesaid by said city, town or village; and the treasurer of the fire department shall receive the money so collected and shall pay out the same upon the order of the said fire department for the purposes of the maintenance, use and benefit of such department: *Provided*, that in any city, town or village where a firemen's pension fund is or may be established under other laws of this State all of the amount so collected may be set apart and appropriated by the city, town or village to the fund for the pensioning of disabled and superannuated members of the fire department, and of the widows and orphans of deceased members of the fire department of cities, towns and villages having an organized fire department. Cities, towns and villages are hereby empowered to prescribe by ordinance the amount of tax of license fee to be fixed, not in excess of the above rate, and at that rate such corporations, companies and associations shall pay upon the amount of all premiums which, during the year ending on every first day of July, shall have been received for any insurance effected or agreed to be effected in the city, town or

village, by or with such corporation, companies or association respectively. Every person who shall act in any city, town or village as agent or otherwise, for or on behalf of such corporation, company or association, shall, on or before the fifteenth day of July of each and every year, render to the city, town or village clerk a full, true and just account verified by his oath of all the premiums which, during the year ending on every first day of July preceding such report, shall have been received by him, or any other person for him in behalf of any such corporation, company or association, and shall specify in said report the amounts received for fire insurance. Such agents shall also pay to the treasurer of any such city, town or village, at the time of rendering the aforesaid report, the amount of rates fixed by the ordinance of the said cities, towns or villages, for which the companies, corporations or associations represented by them are severally chargeable by virtue of this act, and the ordinance passed in pursuance thereof. If such account be not rendered on or before the day herein designated for that purpose, or if the said rates shall remain unpaid after that day, it shall be unlawful for any corporation, company or association so in default to transact any business or insurance in any such city, town or village until the said requisition shall have been fully complied with; but this provision shall not relieve any company, corporation or association from the payment of any risk that may be taken in violation hereof. (As amended by act approved June 29, 1915. In force July 1, 1915. L. 1915, p. 284.)

V.

ACT OF 1899 IN RELATION TO CASUALTY INSURANCE COMPANIES.

The provisions of this Act, as amended by subsequent acts, so far as they are claimed to have any bearing upon the validity of Section 30 of the fire, marine and inland navigation insurance company act, are contained in sections 1, 7 and 15, which provide as follows:

"Section 1. WHO MAY FORM—PURPOSES.) *Be it enacted by the People of the State of Illinois represented in the General Assembly:* Any number of persons, not less than thirteen, may, in the manner hereinafter prescribed, form a corporation for the purpose of issuing policies for any of the following kinds of insurance business:

"First—Insuring any persons against bodily injury, disablement or death resulting from accident, and providing benefits for disability caused by disease.

"Second—Insuring against loss or damage resulting from accident to, or injury suffered by, an employee or other person for which accident or injury the person insured is liable.

"Third—To guarantee or indemnify merchants, traders and all others engaged in business and giving credit therein from loss or damage by reason of giving or extending credit to their customers.

"Fourth—Against loss by burglary or theft or both.

"Fifth—Upon glass against breakage.

"Sixth—Upon steam boilers and pipes, engines and machinery connected therewith or operated thereby; against explosion and accident and loss or damage to life or property resulting therefrom and to make inspection of and to issue certificates of inspection upon such boilers and pipes, engines and machinery; also upon elevators and machinery forming a part thereof and to make inspection and to issue certificates of inspection upon the same.

"Seventh—Insuring against any hazard resulting from the ownership, maintenance or use of any automobile or other vehicle.

“Eighth—Against any other casualty or insurance risk specified in the articles of organization, which may lawfully be the subject of insurance and the formation of corporations for insuring against which is not otherwise provided for by these statutes.”

“Section 7. FOREIGN CASUALTY—INSURANCE COMPANY, WHEN AUTHORIZED TO TRANSACT BUSINESS IN ILLINOIS.) Any casualty insurance corporation organized under the laws of any other state or foreign country may be admitted to transact business in this State by filing with the insurance superintendent for his approval, the following documents and papers:

“First—An application for license to do business in this State, setting forth the full name of the corporation, the location of its principal office of business, and, separately, the several kinds of business to be transacted; said application shall contain the declaration prescribed in an act entitled ‘An Act for the better regulation of the business of insurance, and for the protection of the citizens of this State in their dealing with insurance companies,’ approved June 4th, 1879, in force July 1st, 1879, and otherwise conform to the requirements of said act, and such company shall also be subject to all the provisions, requirements and penalties of said act upon such form of blank as the said superintendent may prescribe.

“Second—A certificate of deposit from the state official having the custody of the securities showing to the satisfaction of said insurance superintendent that the corporation has the amount of funds required by this act to be deposited by companies incorporated in this State invested in securities deposited with the superintendent of the insurance department, State Treasurer or other proper officer of the state in which it is incorporated, if incorporated in the United States, and if a foreign corporation, then in some one of the states of the United States, that such securities are not pledged or incumbered and have a market value of at least one hundred thousand dollars, but are held and remain for the benefit and security of the policy-holders of such corporation residing in the United States, or in default of such certificate of deposit shall de-

posit with the insurance superintendent, for the benefit and security of its policy-holders the amount and kind of securities required to be deposited by companies of this State. The stocks and securities so deposited may be exchanged from time to time for other securities, to be approved by the insurance superintendent and so long as the corporation so depositing shall continue solvent and comply with the laws of this State, it may be permitted by the insurance superintendent to collect the interest or dividends on said securities.

“Third—A duly certified copy of its charter and by-laws together with a certificate from the insurance superintendent or other proper officer of the state wherein incorporated, that the corporation is duly organized and licensed to transact the business of casualty insurance in such state, stating separately the different kinds of insurance, as provided in section 1 of this act, together with an appointment of the insurance superintendent of this State, and his successors in office as attorney upon whom any summons, notice or process of any court of this State may be served.

“Fourth—A Complete Statement of the Financial Condition of the Corporation.) All such corporations admitted to transact business in this State must comply with the laws governing like corporations organized under the laws of this State, except that such corporations as are at the date of the passage of this act admitted to transact in this State more than four of the kinds of business named in subdivisions of section 1 hereof, may continue such business on a capital of not less than two hundred thousand dollars, and all such corporations and all persons acting as agents thereof shall be subject to the same penalties prescribed by these statutes relating thereto for a violation of any of the provisions thereof and to the same methods for the enforcement of such penalties. The said company shall apply annually to the insurance superintendent for a certificate for each of its agents to do business in this State.

“Section 15. CERTIFICATE OF AUTHORITY TO AGENTS—PENALTY FOR VIOLATION OF SECTION.) No person, company or corporation shall act as agent for the purpose of soliciting risks or making insurance for

any casualty insurance company incorporated under the laws of any other state or foreign country, directly or indirectly taking risks or transacting the business named in this act, in this State, without first procuring from the insurance superintendent a certificate of authority stating that such company has complied with all the laws of this State relating to such company, which certificate shall continue in force until the first day in March next after its issue unless revoked for cause. A fee of two dollars shall be paid to the superintendent for each such certificate. Any company, association, individual or individuals making insurance in violation of this act, or any person acting as agent or who shall solicit any insurance for such company, association, individual or individuals shall forfeit for each offense a sum not exceeding one thousand dollars."

VI.

SECTION 12 OF "AN ACT IN RELATION TO THE INVESTIGATION AND PREVENTION OF FIRE AND DANGEROUS CONDITIONS IN AND NEAR BUILDINGS AND OTHER STRUCTURES," APPROVED JUNE 15, 1909, IN FORCE JULY 1, 1909, AS AMENDED IN 1921, ARE AS FOLLOWS:

Sec. 12. TAX ON FIRE INSURANCE COMPANIES FOR MAINTENANCE OF OFFICE OF FIRE MARSHAL—REPORT OF GROSS PREMIUMS RECEIVED—DISPOSITION OF TAX FUND.) For the purpose of maintaining the office of the State Fire Marshal and paying the expenses incident thereto, every fire insurance company, whether upon the stock or mutual plan, and all individuals, firms, corporations, associations or aggregations of underwriters doing business in the State of Illinois, shall pay to the Insurance Superintendent of the State of Illinois in the month (of) February annually, in addition to the taxes now required by law to be paid by such companies, associations, partnerships, firms or individuals, not exceeding one-fourth of one per cent of the gross premium receipts of all such companies, firms, individuals, associations or

partnerships on all business done in the State of Illinois during the year preceding or such portion of the year as this law may have been in effect as shown by their annual statement under oath to the Insurance Department, in case such company, association, firm, partnership or aggregation of underwriters is now required by law to make such annual report or does make such report, but it is expressly provided that from and after the taking effect of this law every such company, firm, partnership, association or body of individuals acting as underwriters or insuring each other, no matter how or under what form the business of fire insurance is done, shall annually report to the Insurance Superintendent the gross premiums received for the year or portion of year preceding, and shall, during the said month of February of each year, pay to the Insurance Superintendent such amount as may be assessed, not exceeding one-fourth of one per cent of such gross premium receipts as hereinbefore provided. The Superintendent of Insurance shall cover the money so received into the State Treasury as a special fund for the maintenance of said office of fire marshal and the expense incident thereto. Any portion of said special fund remaining unexpended at the end of any fiscal year not needed for the maintenance and expenses of the Department of Fire Marshal shall be carried forward to the next fiscal year and the next assessment correspondingly reduced. The said fire marshal shall keep on file in his office an itemized statement of all expenses incurred by his department and shall approve all vouchers issued therefor before the same are submitted to the Auditor of State for payment, which said vouchers shall be allowed and paid in the same manner as other claims against the State.

VII.

ACT OF 1919 IN RELATION TO A PRIVILEGE TAX.

The provisions of this Act, so far as this may have any bearing upon the validity of Section 30 of the Act of 1869, are contained in Sections 1, 3, 12 and 15, which provide as follows:

“An Act in relation to the taxation of non-resident corporations, companies and associations for the privilege of doing an insurance business in this state. In force July 1, 1919. (Laws of 1919, p. 628.)

“Section 1. ANNUAL STATE PRIVILEGE TAX ON NON-RESIDENT COMPANIES—COMPUTATION—COMPANIES SUBJECT TO TAX—EFFECT ON OTHER TAXES AGAINST COMPANIES.) *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That each non-resident corporation, company and association licensed and admitted to do an insurance business in this State shall, except as herein otherwise provided, pay an annual State tax for the privilege of doing an insurance business in this State, equal to two per centum on the gross amount of premiums received during the preceding calendar year on contracts covering risks within this State, which gross amount of premiums shall include all premiums received during the preceding calendar year on all policies, annuity contracts, certificates, renewals, policies subsequently cancelled, insurance and reinsurance executed, issued and delivered during such preceding calendar year, and all premiums that are received during such preceding calendar year on all policies, annuity contracts, certificates, renewals, policies subsequently cancelled, insurance and reinsurance executed, issued and delivered in all years prior to such preceding calendar year, whether such premiums were in the form of money, notes, credits or any other substitute for money, after deducting from such gross amount of premiums the amount of returned premiums on cancelled policies covering risks within this State (but returns on life insurance policies, commonly known as surrender values, shall not be considered returned premiums on cancelled policies); also the amount paid for reinsurance of risks within this State to companies duly licensed to transact business in this State, and also the amount returned to holders of policies on risks within this State as dividends, paid in cash or applied in the reduction of premiums.

“There shall be deducted from the tax thus computed the amount (if any) paid by such corporation, company or association, to cities and villages as a

tax on premiums received by such corporation, company or association in such cities and villages during the preceding calendar year for the benefit of organized fire departments, and the remainder shall be assessed against such corporation, company or association as its annual privilege tax.

"This Act shall apply to all corporations, companies, and associations organized under the laws of any other state, territory or foreign country and admitted to transact the business of insurance in this State on the stock, mutual, stock and mutual, or assessment plan. This Act, however, shall not apply to fraternal beneficiary associations or societies.

"The tax herein provided for shall be in lieu of all license fees or privilege or occupation taxes levied or assessed by any municipality in this State, and no municipality shall impose any license fee or privilege or occupation tax upon any such corporation, company or association, or any of its agents, for the privilege of doing an insurance business therein; but this Act shall not be construed to prohibit the levy and collection of any State, county or municipal taxes upon the real and personal property of such corporations, companies and associations, nor to prohibit the levy and collection of taxes for the benefit of organized fire departments in cities and villages, nor to prevent the levy and collection of taxes for the purpose of maintaining the office of the Fire Marshal of this State and paying the expenses incident, nor to prevent the levy and collection of the tax authorized by section 30 of an Act entitled, 'An Act to incorporate and to govern fire, marine and inland navigation insurance companies doing business in the State of Illinois,' approved March 11, 1869, in force July 1, 1869, as amended."

"Section 3. ANNUAL REPORT BY COMPANY—REQUISITES.) Each insurance company, corporation and association subject to the provisions of this Act shall, in addition to all other statements and reports required by law, make a report in writing to the Department of Trade and Commerce, not later than the first day of August, A. D. 1919, and not later than the first day of March in each year thereafter, on such forms as the Department of Trade and Commerce may prescribe. Such report shall, among other things, state:

“(1) The name of the corporation, company, or association.

“(2) The location of its principal office (if any) in this State, and the location of its principal office in the state of its domicile or entry.

“(3) The gross amount of premiums received by it during the preceding calendar year ending December 31, on contracts covering risks within this State, which gross amount of premiums shall include all premiums received during the preceding calendar year on all policies, annuity contracts, certificates, renewals, policies subsequently cancelled, insurance and reinsurance executed, issued and delivered during such preceding (preceding) calendar year, and all premiums that are received during such preceding calendar year on all policies, annuity contracts, certificates, renewals, policies subsequently cancelled, insurance and reinsurance executed, issued and delivered in all years prior to such preceding calendar year, whether such premiums were in the form of money, notes, credits, or any other substitute for money.

“(4) The amount of returned premiums on cancelled policies covering risks within this State (but returns on life insurance policies, commonly known as surrender values, shall not be considered returned premiums on cancelled policies), the amount paid for reinsurance of risks within this State to companies duly licensed to transact business in this State, and the amount returned to holders of policies on risks within this State as dividends, paid in cash or applied in the reduction of premiums.

“(5) The amount (if any) paid to cities and villages as a tax on premiums received by such corporation, company or association in such cities and villages during the preceding calendar year for the benefit of organized fire departments.

“Such report shall be signed and sworn to by the president, vice-president, secretary, treasurer, or manager of the company, and in case the company is in the hands of an assignee or receiver, then such report shall be signed and sworn to by such assignee or receiver.

“Section 4. SUPPLEMENTAL REPORTS.) The Department of Trade and Commerce may require at

any time further or supplemental reports, verified as herein prescribed, with reference to any matter pertinent to the proper assessment of the tax herein provided for, and it shall be the duty of such corporations, companies and associations to promptly furnish such reports.

"Section 5. ASSESSMENT OF TAX.) The Department of Trade and Commerce shall, from the reports herein required to be filed with it, assess a tax at the rate herein prescribed against each corporation, company and association required herein to make such reports.

"Section 6. WHEN TAX DUE AND PAYABLE.) Except as otherwise provided in section 14 hereof, the tax herein provided to be paid shall be due and payable on the first day of July of each year, and shall be the tax for the year commencing on the first day of July in which it is due and ending on the thirtieth day of June next thereafter.

"Section 7. FAILURE OF COMPANY TO FILE ANNUAL REPORT—ASSESSMENT OF TAX—ADDITION OF PENALTY.) If any corporation, company or association, subject to the provisions of this Act, shall fail or refuse to file its annual report within the time required by this Act, the Department of Trade and Commerce shall assess a tax against such corporation, company or association, based upon the best possible available information, adding to such assessment a penalty of ten per centum upon such assessment.

"Section 8. OBJECTIONS TO AND MODIFICATION OF ASSESSMENT.) The Department of Trade and Commerce shall have power to hear and determine objections to any assessment, and, after hearing, to change or modify any assessment.

"Section 9. NOTICE OF TAX, ETC.—DUTY TO MAIL TO COMPANY—EFFECT OF COMPANY'S FAILURE TO REPORT.) On or before the fifteenth day of May of each year, the Department of Trade and Commerce shall mail a notice in writing to each corporation, company and association against which a tax is assessed, stating the amount of the tax assessed against it for the year next ensuing commencing on July 1, and that objections (if any) to such assessment will be heard by the Department of Trade and Commerce on a day stated therein, not later than the twenty-fifth day of

June. Such notice shall further state that the tax therein assessed is payable to the Department of Trade and Commerce on July 1 after the date of said notice. The notice required by this section shall be mailed to the corporation, company or association, addressed to its postoffice address as shown by the records in the office of the Department of Trade and Commerce. A failure to receive the notice mentioned in this section shall not relieve any corporation, company or association, of the obligation to pay such taxes, nor shall it invalidate the assessment of the tax.

“Section 10. WHEN TAX DELINQUENT—PENALTY.) If the tax assessed in accordance with the provisions of this Act shall not be paid on or before the thirty-first day of July of the year in which the assessment is made, it shall be deemed to be delinquent, and there shall be added a penalty of five per centum for each month or part of month that the same is delinquent, commencing with the month of August.

“Section 11. ACTION OF DEBT FOR TAXES AND PENALTIES.) The Department of Trade and Commerce, through the Attorney General, may at any time after the tax becomes delinquent institute an action of debt, in the name of the People of the State of Illinois, in any court of competent jurisdiction, for the recovery of the amount of such taxes and penalties due, and prosecute the same to final judgment, and take such steps as may be necessary to collect the same.

“Section 12. DEFAULT IN MATTER OF REPORT OR TAX—REVOCATION OR SUSPENSION OF COMPANY’S LICENSE.) If any corporation, company or association shall fail, neglect or refuse to make and file any report herein required, or shall fail, neglect or refuse to pay any tax assessed against it under the provisions of this Act, within thirty days after the same becomes due and payable, the Department of Trade and Commerce shall have power to revoke the license of such defaulting corporation, company or association to transact the business of insurance in this State, or it may suspend the same until such report or reports are filed or such tax and penalties (if any) are paid.

“Section 15. LICENSE TO DO BUSINESS—ISSUANCE—DATE OF TERMINATION—RENEWAL.) The authority of

each non-resident corporation, company and association, admitted to do an insurance business in this State, shall be evidenced by a license to be issued by the Department of Trade and Commerce, in which shall be stated the kind or kinds of insurance business authorized to be transacted. All licenses issued by virtue of the provisions hereof shall terminate on the thirtieth day of June next after the date thereof, and may be renewed annually thereafter upon compliance with the laws of this State."

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WM. F. STANB
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IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1926

No. 179

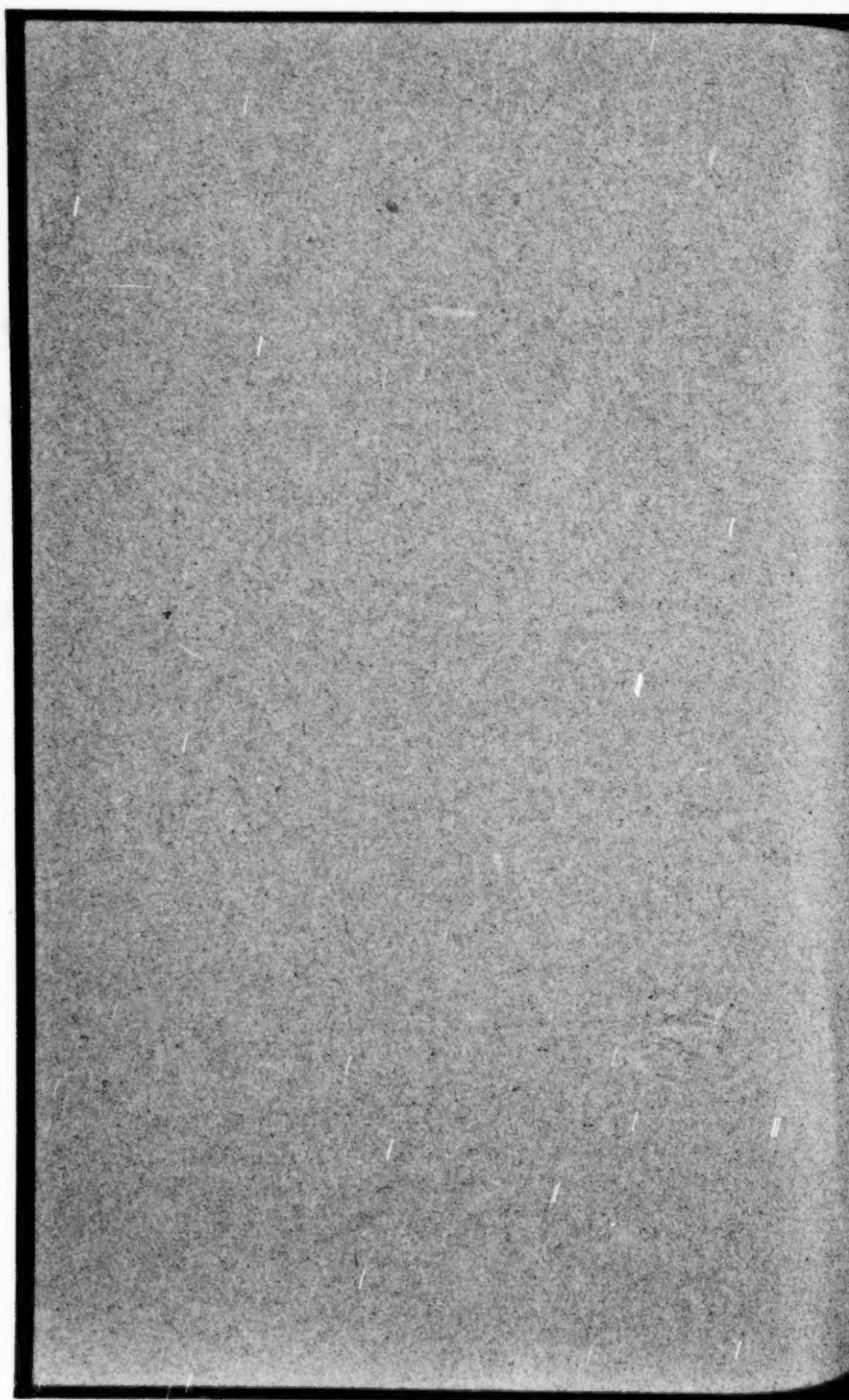
HANOVER FIRE INSURANCE COMPANY,
Plaintiff in Error,
vs.

PATRICK J. CARR, County Treasurer and Ex Officio
County Collector of Cook County, Illinois,
Defendant in Error.

ERROR TO THE SUPREME COURT OF
ILLINOIS

PETITION OF DEFENDANT IN ERROR FOR
REHEARING

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IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1926

No. 179

HANOVER FIRE INSURANCE COMPANY, *Plaintiff in Error,*

v.

PATRICK J. CARR, County Treasurer and Ex-Officio
County Collector of Cook County, Illinois,

Defendant in Error.

ERROR TO SUPREME COURT OF ILLINOIS
PETITION OF DEFENDANT IN ERROR FOR
REHEARING

*To the Honorable the Chief Justice and the Associate
Justices of the Supreme Court of the United States:*

The defendant in error in the above entitled cause respectfully petitions the court to grant a rehearing in said cause and in support of the said petition presents the following:

The decision of this case involves directly or indirectly, the validity not only of a law of Illinois but also of the laws of a large number of other states of the Union relating to the taxation of foreign insurance

companies. If it is adhered to, and the reasoning of the opinion put forward in its support is held to be sound, very few of those laws can survive and in Illinois there will remain no law by which foreign fire insurance companies can be compelled to pay any taxes after their admission into the State, and thus, in its endeavor to secure to them the equal protection of the laws, the court will have denied the equal protection of the laws to domestic fire insurance companies and other taxpayers. The opinion shows that the court has been misled into a misapprehension of material facts and of the meaning and effect of the statutory provisions necessary to be considered. Apart from this it disregards and indirectly overrules many of the court's previous decisions, which are not referred to in the opinion and which, unfortunately, were not called to the court's attention, and repudiates the language of the opinions by which they were supported, language which state legislatures have for many years relied upon in framing tax legislation. The construction it places upon the equal protection clause of the Fourteenth Amendment is revolutionary in its character and imposes upon the States restrictions of their right to enter into contracts by making the validity of contracts by foreign insurance companies for the payment of money for privileges granted to depend upon the time payment is agreed to be made and the method of computing its amount. It makes it impossible for the State of Illinois to enact any law for the taxation of foreign fire insurance companies that will not be in conflict with the Fourteenth Amendment unless the State amends its own Constitution and makes radical changes in its existing revenue laws.

Suggestions in support of the petition will be presented in a form as brief and concise as circumstances

will permit. The equal protection of the laws clause of the Fourteenth Amendment is a large subject. The decisions of this court construing it are numerous and to a considerable extent conflicting. A considerable number of them have been dissented from by some of the members of the court, sometimes one, sometimes two, sometimes three, and not infrequently four. A proper review of the decision in the instant case will require that a considerable number of former decisions be referred to and commented on. This cannot be done as it should be in a short petition.

The following are the grounds relied upon as requiring the granting of a rehearing:

I.

A State May Impose Upon a Foreign Insurance Company, as a Condition of Its Being Permitted to Transact Business Within the State's Limits, Any Burden Which It May Impose Upon a Domestic Company of Like Character as a Condition of Its Organization and Operation Within the State.

In *Orient Insurance Company v. Daggs*, 172 U. S. 557, 43 L. Ed. 552, decided in 1898, the Court sustained a statute applicable to fire insurance only which made the entire amount of the insurance payable in case of total loss, except as reduced by depreciation of the property after it was insured. In its opinion, Mr. Justice McKenna, speaking for the Court, said:

"That which a State may do with corporations of its own creation it may do with foreign corporations admitted into the State. This seems to be denied, if not generally, at least as to plaintiff in error. The denial is extreme and cannot be maintained. The power of a State to impose conditions upon foreign corporations is certainly as

extensive as the power over domestic corporations and is fully explained in Hooper v. California, 155 U. S. 648, 39 L. Ed. 297, and need not be repeated."

The soundness of this proposition is self-evident. The right of a domestic company to come into existence and transact business in the State and the right of a foreign company to come into the State and transact business are both creatures of the State and it must necessarily have the right to prescribe the lawful burdens which the companies must assume if they avail themselves of the privileges conferred by the laws which permit them to organize or come into the State. There are some things, of course, which they cannot be compelled to do, but the payment of money to the State is not one of them. Such a corporation is not an infant or a person *non compos* and it cannot insist that it has no power to agree to pay for a privilege the price in money put upon it by the State, a price which an individual could not be prohibited from paying without denying him the right to enter into contracts and thus depriving him of property without due process of law.

In the case cited the law limited the right of the insurance company to enter into contracts. The right to contract is a right protected by the Fourteenth Amendment as this court has often held. If the opinion of the court in the instant case is sound how could the State, in a law providing for the admission of a foreign insurance company, require that certain contracts, not otherwise illegal, should be held illegal when made after the insurance company had paid its "admission fee" and had been admitted into the State?

A Domestic Corporation Which Avails Itself of the Privileges Conferred by the Law Under Which It Is Organized Cannot Repudiate Performance of the Burdens Which That Law Imposes Upon It and This Is True Even If the Imposition of Those Burdens Would Be Unconstitutional If They Were Imposed Upon a Corporation in Existence When the Law Imposing Them Was Passed. The Same Rule Must Be Applied to a Foreign Corporation With Respect to Burdens Imposed Upon It By the Law Which Admits It Into the State.

The first of these two propositions has been laid down by this Court many times. It is applicable as well to corporations organized under a general law as to those operating under special charters. If it is sound as applicable to domestic corporations it must be sound as to foreign corporations for *otherwise the result would be to deny domestic corporations the equal protection of the laws*. The second proposition is a necessary sequence of the first.

In *Ashley v. Ryan*, 153 U. S. 436, 443, 38 L. Ed. 773, 777, decided in 1894, the court considered an Ohio statute which provided for the payment of fees for the organization of a corporation formed by the consolidation of existing corporations. The fees fixed were a percentage of the *entire* capital stock of the consolidated corporation. It was claimed that the fees thus provided for, if exacted in a case where some of the corporations included in the consolidation were corporations of other states, would amount to a tax or burden upon interstate commerce and would, therefore, be invalid. The court, in an opinion delivered

by Mr. Justice White, sustained the statute, and, in doing so, among other things, said:

"At the time the articles (i. e., of consolidation) were presented for filing, the statute law of the State charged the parties with notice that the benefits which it was sought to procure could not be obtained without payment of the sum which the secretary of state exacted. * * * The act of filing, constituting, as it does, a claim of right to the franchise granted by the state law, *carried with it a voluntary assumption of any burden with which the privilege was accompanied and without which the right of corporate existence could not have been procured.* * * * Having thus accepted the act of grace of the state and taken the advantages which sprang from it, *the company cannot be permitted to hold on to the privilege or right granted, and at the same time repudiate the condition by the performance of which it could alone obtain the privilege which it sought.* * * *"

"The power of corporations of other states to become corporations, or to constitute themselves a consolidated corporation, under the Ohio statutes, and thus avail of the rights given thereby is as completely dependent on the will of that state as is the power of its individual citizens to become a corporate body, or the power of corporations of its own creation to consolidate under its laws. * * *"

"It follows from these principles that a state, in granting a corporate privilege to its own citizens, or what is equivalent thereto, in permitting a foreign corporation to become one of the constituent elements of a consolidated corporation organized under its laws, may impose such conditions as it deems proper, and that the acceptance of the franchise in either case implies a submission to the conditions without which the franchise could not have been obtained."

In the case thus cited the tax was one imposed as a condition *precedent* to the filing of the articles of consolidation, but, as we shall show later on, the opinion of this court was quoted from with approval in a very late case in which the statute assailed imposed upon the consolidated corporation an annual tax computed upon its entire capital stock, which tax, of course, was to be extended after the corporation was organized and hence its payment was a condition *subsequent*.

This is important to consider in view of the fact that in the instant case the court distinguishes between a condition *precedent* and a condition *subsequent*.

In *Grand Rapids & Indiana Ry. Co. v. Osborne*, 193 U. S. 17, 48 L. Ed. 598, a railroad company organized under a law of Michigan which provided that the maximum charge which railroad corporations might make for the transportation of passengers and their ordinary baggage on roads exceeding 25 miles in length should be 3 cents per mile. The court held that the company, by incorporating under the Act, was estopped from contesting its validity. Speaking through Mr. Justice White the court, after stating the facts, said:

“It results from the foregoing that Sims—the purchaser of the railroad property in question at the sale under foreclosure—and his associates could not demand to be incorporated under the statute of Michigan as a matter of contract right. Possessing no such contract right they or their privies *cannot now be heard* TO ASSAIL THE CONSTITUTIONALITY OF THE CONDITIONS WHICH WERE AGREED TO BE PERFORMED *when the grant by the state was made of the privilege to operate as a corporation the property in question. Having voluntarily accepted the privileges and benefits of the incorporation law of Michigan the company was bound by the provisions of existing laws regulating rates of fares upon railroads, and it is es-*

topped from repudiating the burdens attached by the statute to the privilege of becoming an incorporated company. Daniels v. Tearney, 102 U. S. 415, 26 L. Ed. 187, and cases cited. That a railroad corporation may contract with a municipality or with a state to operate a railway at agreed rates of fare is unquestionable. And where the provisions of an accepted statute respecting rates to be charged for transportation are plain and unambiguous and do not contravene public policy or positive rules of law, it is clear that a railroad company cannot avail of privileges which have been procured upon stipulated conditions and repudiate performance of the latter at will."

In the case cited the law in question was a general law and not a *special charter*. The railroad was partly in Michigan and partly in Indiana and hence the company was engaged in interstate commerce. It was claimed by the railroad company that the Act was repugnant to the commerce clause of the constitution of the United States and it was contended that the gross receipts from passenger traffic in Michigan forming the basis of the proposed reduction in rates included receipts from inter-state traffic, and that if such interstate traffic receipts were not included the gross receipts would be less than \$2,000 per mile, and hence the reduced rate prescribed by the commissioner of railroads would not be enforceable. It was also contended by the company that the statute was repugnant to the due process and equal protection clauses of the Fourteenth Amendment and that if the reduction of rates were put in force those rates would leave but a trifle of surplus after deduction of reasonable operating expenses, interest on debt and other fixed charges. *On the part of the state it was contended that the railroad company, by incorporating under the law which embodied the provisions complained of, had entered into*

a contract with the state to carry passengers at the rate fixed in the statute. The court adopted this view and held the contract enforceable.

The decision of the Court in that case was concurred in by all the then members of the Court.

In *Newburyport Water Co. v. Newburyport*, 193 U. S. 561, 579, 48 L. Ed. 795, decided in 1904, where a company had conveyed its property to a city under a legislative act which stipulated that the value of the property should be estimated in a certain way, the court, speaking through Mr. Justice White, said:

“Having accepted the statute, conveyed its property to the city, provoked the state proceedings to value the property, and derived the benefits resulting from the legislation of the State of Massachusetts, the water company may not now, BECAUSE OF DISAPPOINTMENT AT THE RESULT OF THE INTERPRETATION WHICH THE STATUTE RECEIVED AT THE HANDS OF THE STATE COURT, change its position and cause its voluntary acceptance to become an involuntary one IN ORDER TO ASSAIL THE CONSTITUTIONALITY OF THE LEGISLATION IN QUESTION.”

The decision in the last cited case also was concurred in by all the then members of the court.

In *Interstate Consolidated Street Railway Co. v. Massachusetts*, 207 U. S. 79, 52 L. Ed. 111, decided in 1907, the court held that a street railway company whose charter subjected it to “all the duties, liabilities and restrictions set forth in all general laws now or hereafter in force relating to street railway companies,” was bound by the requirement of a statute previously enacted that street railway companies should transport school children at a reduced rate, *although such statute might be unconstitutional as to already existing companies*. The court, in its opinion delivered by Mr. Justice Holmes, said:

“There is no doubt that, by the law as understood in Massachusetts, at least, the provisions of Rev. Laws, Chap. 112, Sec. 72, Stat. 1900, Chap. 197, if they had been inserted in the charter in terms, would have bound the corporation, *whether such requirements could be made constitutionally of an already existing corporation or not*. The railroad company would have come into being and have consented to come into being subject to the liability, and could not be heard to complain. *Rockport Water Co. v. Rockport*, 161 Mass. 279, 37 N. E. 168; *Ashley v. Ryan*, 53 U. S. 436, 448, 38 L. Ed. 773, 777, *Wright v. Davidson*, 181 U. S. 371, 377, 45 L. Ed. 900, 903; *Newburyport Water Co. v. Newburyport*, 193 U. S. 561, 579, 48 L. Ed. 795.”

The conclusion reached by the Court in the case last cited was concurred in by all the then members of the court excepting Mr. Justice Moody who, because of having been of counsel, did not sit. In the opinion, as delivered by Mr. Justice Holmes, it is said:

“A majority of the court considers that the case is disposed of by the fact that *the statute in question was in force when the plaintiff in error took its charter and confines itself to that ground*.”

Mr. Justice Harlan stated that he thought the act not liable to the objection that it denied to the railway company the equal protection of the laws and that he did not think it could be held, upon any showing made by the record, to be unconstitutional as depriving the plaintiff in error of its property without due process of law.

Thus we have at least three unanimous decisions of this court that a corporation which voluntarily accepts the benefits of a law *cannot be permitted to deny*

the constitutionality of its provisions and repudiate performance thereof and to insist that they violate the Fourteenth Amendment.

In the instant case the condition in question is purely a *money* condition and hence is one which concerns only the state and the insurance company, and therefore the case resolves itself into the question whether the company, after obtaining the privilege, which it could not have obtained without agreeing, either expressly or impliedly, to pay for it what the state demanded, can repudiate payment of the price. In this respect, as we shall point out more fully hereafter, it differs from a case where the question is whether there can be a valid agreement by a corporation to waive its right to invoke the jurisdiction of the federal courts or the right to due process of law.

In *Kansas City, Memphis & Birmingham R. R. Co. v. Stiles*, 242 U. S. 111-120, 61 L. Ed. 176-187, decided in 1916, the railroad company was a consolidation of railroads in Alabama, Tennessee and Mississippi, the consolidation being made in pursuance of the laws of Alabama. The laws of Alabama provided that corporations organized under its laws should pay an annual franchise tax which was to be computed upon its *entire* paid-up capital stock, while corporations organized under the laws of other states should pay a franchise tax based only on *the actual amount of capital employed in Alabama*. The consolidated railroad company averred if it was required to pay the franchise tax in question upon its *entire* capital, it would be paying another and different rate of taxation, or another and different amount of franchise tax, from that which was required of like corporations doing business in Alabama, contrary to the provisions of the Fourteenth Amendment to the Federal Constitution that no State shall deny to any person within its jurisdiction the

equal protection of its laws; that the enforcement of the act by subjecting to its operation the railroad company's property in other States constituted a taking of its property without due process of law; *and that said act imposed a direct burden upon interstate commerce.* The court, however, in an opinion delivered by Mr. Justice Day and concurred in by all the then members of the Court, sustained the validity of the tax, saying:

“When the companies comprised in this consolidation sought to avail themselves of the laws of Alabama, they were asking a privilege and right which, subject to the limitations of the Federal Constitution, was within the authority of the state. This principle was succinctly stated in *Ashley v. Ryan*, 153 U. S. 436, 442, 38 L. Ed. 773, 777, 4 Inters. Com. Rep. 664, 14 Sup. Ct. Rep. 865:

“Nor is the question at issue affected by the fact that some of the constituent elements which entered into the consolidated company were corporations owning and operating property in another state. The power of corporations of other states to become corporations, or to constitute themselves a consolidated corporation, under the Ohio statutes, and thus avail of the rights given thereby, is as completely dependent on the will of that state as is the power of its individual citizens to become a corporate body, or the power of corporations of its own creation to consolidate under its laws. *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. Ed. 274; *Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. Ed. 451; *Paul v. Virginia*, 8 Wall. 168, 181, 19 L. Ed. 357, 360.’

“This doctrine has been affirmed since. *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 703, 40 L. Ed. 849, 860, 16 Sup. Ct. Rep. 714, and previous cases in this court therein cited; *Interstate Consol. Street R. C. v. Massachusetts*, 207 U. S. 79, 84, 52 L. Ed. 111, 114, 28 Sup. Ct. Rep. 26, 12 Amn. Cas. 555.

"The railroads comprising this consolidation entered upon it with the Alabama statute before them and under its conditions, and, subject to constitutional objections as to its enforcement, they cannot be heard to complain of the terms under which they voluntarily invoked and received the grant of corporate existence from the State of Alabama."

The decision in this case was reaffirmed in *Cheney Brothers Co. v. Massachusetts*, 246 U. S. 167, 62 L. Ed. 632, decided in 1917, in an opinion delivered by Mr. Justice Van Devanter and concurred in by all the then members of the court.

If the railroad company had been a *foreign* corporation or if it had been organized as an Alabama corporation under a law which did not provide for such a tax as that which was provided for by the statute authorizing the consolidation, the imposition of the tax would have been in violation of the Fourteenth Amendment because it would have denied the corporation the equal protection of the laws and would also have been repugnant to the commerce clause of the United States Constitution because it imposed a burden upon interstate commerce. This follows from the decisions of this court holding that where a *foreign* corporation is engaged in interstate commerce its taxation by the state must be limited to such a proportion of its property as represents the value of that within the state and that the imposition of a tax upon its entire capital stock is invalid as being a burden upon interstate commerce.

The decision of the court, therefore, was, in effect that *the Kansas City, Memphis and Birmingham Railroad Company*, by accepting the privilege of consolidation, had waived its right to the equal protection of the laws clause of the Fourteenth Amendment as well as to the benefit of the Commerce Clause of the United

States Constitution so far as concerned the question of the taxation of its entire capital stock.

The case last cited would also seem to be a conclusive answer to the apparent contention of the court in the instant case that there is no difference between a burden imposed *by the very statute by which the insurance company secures admission into the state* and one imposed by a statute passed *after the company has secured such admission.*

In the former case the company comes in with its eyes open and cannot be heard to object to the imposition of the burden, while in the latter case it is entitled to protection against a new burden which it was justified in assuming would not be imposed.

As, therefore, a domestic corporation cannot repudiate burdens imposed upon it by the law under which it is organized, though such burdens could not be constitutionally imposed by a subsequent law passed *in invitum*, a foreign corporation, as it cannot occupy a better position in that regard than a domestic corporation, cannot repudiate a similar burden imposed upon it by the law under which it is admitted to transact business in the State. *The law providing for the admission of a foreign corporation to transact business in a State is its charter, so far as its powers and duties in that State are concerned.*

It is, however, claimed that there are decisions of this court which permit a foreign corporation to repudiate burdens imposed, or attempted to be imposed, upon it by law although they may have secured admission into the State by agreeing to bear those burdens. Those decisions we will now consider.

III.

A Decision Upon the Validity of a Provision in a Law Prohibiting a Foreign Corporation from Invoking

the Jurisdiction of the Federal Courts, or from Transacting Business in Other States, or Claiming the Benefit of the Due Process of Law Clause of the Federal Constitution, or One Operating as a Burden Upon Interstate Commerce, Is Not Applicable to the Case of the Imposition of a Money Burden Upon a Foreign Insurance Company by the Law Providing for Its Admission Into the State to Transact Business.

In its opinion (p. 13) the court says:

“One argument urged against our conclusion is that the relation of a foreign insurance company to the State which permits it to do business within its limits is contractual and that by coming into the State and engaging in business on the conditions imposed, it waives *all* constitutional restrictions and cannot object to a condition or law regulating its obligations even though as a statute operating *in invitum* it may be in conflict with constitutional limitations. This argument cannot prevail in view of the decisions of this court in well considered cases. *Insurance Co. v. Morse*, 20 Wall. 445; *Western Union Telegraph Company v. Kansas*, 216 U. S. 1; *Terral v. Burke Construction Co.*, 257 U. S. 529; *Fidelity & Deposit Company v. Tafaia*, 270 U. S. 426; *Frost v. Railroad Commission*, June 7, 1926.”

The court is in error in stating that in our argument we claimed that a foreign corporation coming into a state under a law permitting it to do so contracted to waive *all* constitutional restrictions. On the contrary we admitted the unconstitutionality of the requirement attempted to be imposed upon a foreign corporation of a waiver of the right to invoke the jurisdiction of the Federal courts, the right to due process of law, or, in some cases, the right to transact

business in other states or the requirement of consent to the imposing of a burden upon interstate commerce. (See Brief for Defendant in Error, p. 11.)

The authorities thus cited do not sustain the court's conclusion that the insurance company could not agree to the imposition of the tax now in question, as will appear from an examination of the grounds upon which they were founded. Nor is it sustained by the other cases cited in the Brief for Plaintiff in Error. *The consent of a foreign corporation to abide by a law prohibiting the invoking of the jurisdiction of the Federal courts, or requiring a waiver of due process of law, or of the right to transact business in other states, is ONE THING, but its consent to pay a tax different from or even greater than that imposed upon other taxpayers of the state is QUITE A DIFFERENT THING.* Even the right to transact business in other states may be restricted when the restriction is necessary to the enforcement of other provisions of the law. Examples of this are the statutes of a great many of the states prohibiting a foreign insurance admitted to do business in the state from writing policies of insurance on property within the state excepting through its agents in the state which statutes this court has sustained.

In *Home Insurance Co. v. Morse*, 20 Wall. 445, 22 L. Ed. 365, and in *Terral v. Burke Construction Co.*, 257 U. S. 529, 66 L. Ed. 352, the question was whether a foreign corporation admitted to transact business in a state was bound by an agreement not to invoke the jurisdiction of the Federal courts. The court held that it was not. There is nothing remarkable about these decisions. *They were based upon the proposition that no party to a contract, whether an individual or a corporation, could barter away his right to resort to the Federal courts or to the state courts.* This point was fully considered and decided by this court in

Home Insurance Company v. Morse, and the authorities upon the question were elaborately discussed.

The court, among other things, there said:

“Every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him. A man may not barter away his life or his freedom, or his substantial rights. In a criminal case he cannot, as was held in *Cancenni v. People*, 18 N. Y. 128, be tried in any other manner than by a jury of twelve men, although he consent in open court to be tried by a jury of eleven men. In a civil case he may submit his particular suit by his own consent to an arbitration, or to the decision of a single judge. So he may omit to exercise his right to remove his suit to a Federal tribunal as often as he thinks fit, in each recurring case. In these aspects, any citizen may, no doubt, waive the rights to which he may be entitled. He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented.”

The court cited numerous cases to show that agreements in advance to oust the courts of jurisdiction conferred by law are illegal and void. *Nute v. Ins. Co.*, 6 Gray 174; *Cobb v. Ins. Co.*, 6 Gray 192; *Hobbs v. Ins. Co.*, 56 Me. 421; *Stephenson v. Ins. Co.*, 54 Me. 70; 5 H. of L. Cas. 811.

The Fourteenth Amendment was not considered in the decision of *Home Insurance Co. v. Morse*, or *Terrel v. Burke Construction Co.*

In *Western Union Telegraph Company v. Kansas*, 216 U. S. 1, 54 L. Ed. 355, a statute of Kansas provided for the exaction from a foreign corporation, for the benefit of the permanent school fund, of a “charter fee” of a given per cent of its *entire* authorized capi-

tal stock, as a condition of continuing to do business in the state. The court held that the exaction of this fee from the Telegraph Company, which was engaged in interstate commerce, was invalid under the commerce and due process of law clauses of the Federal Constitution, as necessarily amounting to a burden and tax on the company's interstate business and on its property located or used outside of the state. The court had laid down the same rule in a large number of cases cited in the opinion and, among other things, quoted from its previous opinion in *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. Ed. 649, where the court had said that its decisions,

"are clear to the effect that neither licenses nor indirect *taxation of any kind*, nor any system of state regulation, can be imposed upon foreign commerce; and that all acts of legislation producing any such results are, to that extent, unconstitutional and void."

In this connection it is proper to call the court's attention to the following language of its opinion in the *Crutcher case*:

"The case is entirely different from that of foreign corporations seeking to do a business which does not belong to the regulating power of Congress. The *insurance* business, for example, cannot be carried on in a state by a foreign corporation *without complying with all the conditions imposed by the legislation of that state.*"

The legislation there referred to was, of course, *tax* legislation. While the language in reference to conditions imposed upon foreign insurance companies was only a *dictum*, state legislatures were justified in relying upon it in framing laws in reference to such companies.

The state of Kansas was wholly without power to exclude from its territory any corporation engaged in interstate commerce and hence could not compel the Western Union Telegraph Company to pay for the privilege of coming in, and, of course, it could not indirectly, by an unjust tax which it chose to call a tax on the privilege of doing a local business, put a burden upon interstate commerce. To concede to a State such a power would enable state legislatures to nullify the power of Congress to regulate interstate and foreign commerce.

In *Air-Way Electric Appliance Corporation v. Day*, 266 U. S. 71, 69 L. Ed. 169, the question was whether a state could impose a franchise tax upon a foreign corporation for the privilege of exercising its franchise in Ohio, which tax was to be computed upon the corporation's *entire* capital as well within as without the state, it being engaged in interstate commerce. The tax was imposed *in incitum*. The company, being engaged in interstate commerce, could not be excluded from the state. It was not required to *bargain* with the state in order to get in. *The court held that interstate commerce could not be thus burdened nor could the state tax property beyond its jurisdiction.*

No such situation is presented by the instant case. The Hanover Fire Insurance Company is not engaged in interstate commerce. It cannot carry on business within the state without the state's permission. The tax in question is not levied upon its property outside of Illinois, but is to be computed solely upon the amount of its net receipts acquired during the preceding year within the Town of South Chicago and the County of Cook. In other words the company, as compensation for the privilege, is required to give the state a share of the profits, not of its entire business but of its business in Illinois which it carries on in pursuance of the privilege.

In the opinion in the case last cited no mention is made of the previous decision in *Kansas City, Memphis & Birmingham R. R. Co. v. Stiles*, 242 U. S. 111, 61 L. Ed. 176, *supra*. In neither case was there any dissent from the opinion. Yet in the latter case, because the railroad company was organized under the law of the state and thereby accepted a tax upon all its capital stock, the tax was held valid although the company was engaged in interstate commerce, whereas in the former case, because the corporation was not organized under the laws of the state and was engaged in interstate commerce and had not impliedly agreed to pay a tax on its entire capital stock the tax was held invalid because based upon the company's entire capital stock.

In *St. Louis Cotton Compress Co. v. Arkansas*, 260 U. S. 346, the court held invalid a state statute imposing a tax upon premiums which a foreign corporation doing business in that state paid for insurance on its property in that state, the insurance having been effected outside of the state. On the other hand the court has sustained the form of statute in force in many states prohibiting a foreign insurance company authorized to do business in a state from selling insurance on property in that state excepting through its agents in that state. The latest instance of the sustaining of such a statute is the decision of this court in *Palmetto Fire Insurance Co. v. Conn.*, decided October 25, 1926, which we have commented on in another part of this petition. (See Division IX, *post* p. 76.) Thus the court has held that a State cannot, by a law passed *in invitum*, prohibit a foreign corporation from transacting business in other states, but it can impose such prohibition when the foreign corporation agrees, in advance of its admission to the State, that it may be imposed.

In *Fidelity & Deposit Co. of Maryland v. Tafaoya*,

270 U. S. 426, a statute of New Mexico undertook to make it "unlawful for any insurance company authorized to do business in New Mexico * * * to pay * * * either directly or indirectly any fee, brokerage or other emolument of any nature to any person, firm or corporation not a resident of the State of New Mexico, for the obtaining, placing or writing of any policy or policies of insurance covering risks in New Mexico." The court held this statute invalid on the ground that it was an attempt to regulate the conduct of the company's business in another state. The court, in commenting upon the statute, said:

"The words go beyond any *legitimate interest of the State*, and although the decree is based only on payments to agents, it does not declare that the payments thus made prevented the payment of appropriate commissions to the agents in the State, nor does the statute limit its prohibition in that way."

It will be observed that the decision of the court was based upon the ground that there was no showing that the action of the company in paying these fees to non-residents conflicted in any manner with the interest of the state.

In *Frost v. Railroad Commission*, decided June 7, 1926, the question was as to the power of a state to impose upon an individual citizen of the state an unconstitutional requirement as a condition precedent to the enjoyment of a privilege. The court found that the individual was "given no choice, except a choice between the rock and the whirlpool, an option to forego a privilege which may be vital to his livelihood, or to submit to a requirement which may constitute an intolerable burden."

There is an important difference between an individual and a foreign corporation with respect to the

right to engage in business within the state. The right of an individual to engage in any lawful business within the state is absolute. The state cannot deny him the right, although it may impose any *reasonable* regulation, such as a reasonable license fee, upon its exercise. It cannot impose a regulation which, in effect, for all practical purposes, makes the right of no value to him.

The foreign corporation, however, cannot engage in any business without the state's consent and consequently occupies a very different position from that occupied by an individual. If, in the case cited, the applicant for the permit had been a foreign corporation not engaged in interstate commerce, or one which was an instrumentality of the United States Government, instead of Frost, and had applied for permission to transact business in the State, *there can be no doubt that the state could have imposed upon such corporation the condition in question and refused the permission in case of non-compliance with it.* This follows from the declaration of this court in the opinion (p. 8) in the instant case that,

“With respect to the *admission fee*, so to speak, which the foreign corporation must pay to become a *quasi* citizen of the state and entitled to equal privileges with citizen of the state, *the measure of the burden is in the discretion of the State.*”

It is apparent that the decision in neither of the cases thus relied upon by the court and by plaintiff in error is inconsistent with that in the *Horn Silver Mining Company Case* and other cases announcing the same doctrine. Expressions in judicial opinions must be construed in the light of the questions to be decided. Hence, what may be said in cases involving interstate commerce, the invoking of the jurisdiction of the Fed-

eral Courts, the right to transact business in other states, and the right to due process of law, have no bearing where, as here, the corporation in question is *not* engaged in interstate commerce and the only question is as to the *money* compensation which the state may exact for granting it the privilege of carrying on business within the State's territory, and whether, after accepting the privilege, it can successfully repudiate payment of the compensation.

A foreign insurance company only gets into the state in consideration of compliance with the conditions of its admission and when thereby it secures admission the Fourteenth Amendment does not permit it to repudiate the conditions, especially those conditions which require *payments of money*. It becomes entitled to the equal protection of the laws only because of its *undertaking to comply with those conditions*, and, until it enters into such undertaking, it is not within the jurisdiction of the state. *Its undertaking compliance is conclusively proven by its accepting the benefits conferred by the law*. In other words the equal protection of the laws clause of the Fourteenth Amendment does not apply to such conditions.

That there may be conditions sought to be imposed upon foreign corporations which they should not be required to comply with we do not dispute, but they are conditions compliance with which would conflict with some positive provision of law which forbids such compliance. The following are illustrations:

The jurisdiction of the courts is fixed by the Constitution and laws of the United States and of the several states. It could not be fixed by the agreements of individuals even if there were no Fourteenth Amendment. To permit individuals or corporations to make agreements not to invoke the jurisdiction of the courts might put the courts out of business or lead to great injustice.

The regulation of interstate commerce is committed to the Congress by the Constitution of the United States. The power of Congress over interstate commerce might be destroyed if state legislatures could, either directly or indirectly, impose burdens upon it. Hence a condition *imposed in invitum* by a state compliance with which operates to impose a burden upon interstate commerce cannot be permitted. The case is otherwise, however, with a burden upon interstate commerce upon which the state and a *domestic* corporation agree. *Kansas City, Memphis & Birmingham R. R. Co. v. Stiles*, 242 U. S. 111, 61 L. Ed. 176, *supra*.

The law condemns murder, larceny and many other offenses. Hence a condition imposed upon a foreign corporation that its officers should commit murder, larceny or other crimes, either before or after its admission into the state, would plainly be illegal.

The Constitution of the United States forbids slavery or involuntary servitude excepting as a punishment for crime. An agreement by an individual to become and remain a slave would be void because forbidden by the Thirteenth Amendment.

The Constitution of the United States as well as the Constitutions of many of the states forbids that any person be deprived of life, liberty or property without due process of law. To permit any person to stipulate away his life or liberty, or that he might be deprived of life, liberty or property without due process of law, could not be permitted. It would be shocking to permit a man to agree to give up his life or liberty, and to permit a man to agree that his property might be taken from him without due process of law would lead to results detrimental to the public welfare.

But what is to be said as to the equal protection of the laws when the only question is as to the validity of an agreement by a foreign corporation to pay money

in the future for a privilege which it can only receive by permission of the state and when the state, if it saw fit, could require the payment of the money *in advance*?

Is that upon the same basis as the rights we have referred to above? The equal protection of the laws must be considered, first, in its application to individuals, second, in its application to *domestic* corporations, and, third, in its application to *foreign* corporations.

First. The right of an individual to live in a state and to carry on there any lawful business is absolute. To exercise this right he is not required to secure the permission of the state, although the state, in the exercise of its police power and its power of taxation, may reasonably regulate the manner in which the right is to be exercised and may tax his business for the purpose of raising revenue for the support of the government. It would be a gross injustice if the state, by its legislation, should arbitrarily discriminate between individuals, according rights to some and refusing the same rights to others similarly situated, or imposing tax burdens upon some and not imposing them upon others similarly situated.

Second. Domestic corporations are creatures of the state. They come into being only with the permission of the state. They can transact only such business as the state permits them to transact, and, in consideration of the grant of privileges to them by the state, they must submit to the imposition of such burdens as the state may see fit to impose. As we have already pointed out, by accepting the privilege of organizing under a law they deprive themselves of the right to question the constitutionality of the provisions in that law imposing burdens upon them. *Ashley v. Ryan*, 152 U. S. 436, 443, 38 L. Ed. 773, 777; *Grand Rapids & Indiana Ry. Co. v. Osborne*, 193 U. S. 17, 48 L. Ed. 598; *New-*

buryport Water Co. v. Newburyport, 193 U. S. 561, 48 L. Ed. 795; *Interstate Consolidated Street Railway Co. v. Massachusetts*, 207 U. S. 79, 52 L. Ed. 111; *Kansas City, Memphis & Birmingham R. R. Co. v. Stiles*, 242 U. S. 111, 61 L. Ed. 176. (See Division II, *ante* pp. 4-14.)

Third. Foreign corporations are creatures of other states or countries. They have no existence in the state of Illinois until that state gives them recognition and permits them to transact business within its limits, unless they are engaged in interstate commerce or are instrumentalities of the United States government. The state is authorized to prescribe what they must do to get into the state and transact business, what business they shall transact when they get in, how they shall transact it and what compensation they must pay for the grant of the privilege. Why, then, should it be permitted to them to repudiate burdens imposed upon them on the ground of their unconstitutionality when the same burdens cannot be repudiated by domestic companies transacting the same kind of business? Is the equal protection of the laws clause of the Fourteenth Amendment a one-sided affair which may be availed of by *foreign* corporations, but not by *domestic* corporations?

IV.

A State May Impose Upon a Foreign Insurance Company, as a Condition of Its Being Permitted to Transact Business Within the State's Limits, a Greater Tax Than It Imposes Upon a Domestic Insurance Company as Compensation for the Grant of Its Franchise, and It Does Not Surrender or Abridge Its Power to Change and Revise Its Taxing System and Tax Rates by Merely Licensing or Permitting a Foreign Corporation to

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Within Its Limits.**

This was expressly decided in *Cheney Brothers Company v. Massachusetts*, 246 U. S. 147, 62 L. Ed. 632, and *Kansas City, etc., R. R. Co. v. Stiles*, 242 U. S. 111, 118, 61 L. Ed. 176, 187.

The court, in the instant case, recognizes the binding authority of those decisions, but declares that the decision in the earlier case of *Southern Railway Company v. Greene*, 216 U. S. 400, 54 L. Ed. 563, shows that this power to change is not unlimited. In dealing with that case the court (p. 11) says:

“The decision in *Southern Railway Company v. Greene*, *supra*, shows that this power to change the tax imposed on a foreign corporation as a condition for the license of continuing business is not unlimited, and that *any attempt in a renewal to vary the terms of the original license which, however indirectly, enforces a new condition upon the corporation and involves a deprivation of its Federal constitutional rights cannot be effective*. . . . By compliance with the valid conditions precedent, the foreign insurance company is put on a level with all other insurance companies, domestic or foreign, within the state, and *tax laws made to apply after it has been received into the state are to be considered laws enacted for the purpose of raising revenue for the state and must conform to the equal protection clause of the Fourteenth Amendment.*”

As we construe this language it is based upon the assumption that the instant case is one in which there has been an attempt to vary the terms of the original license. There has been no such attempt by the law of the state and it is with the validity of the law of the state that we are now concerned. It is true that

for many years assessing officers of the state construed Section 30 of the Act of 1869 as requiring the debasement and equalization of the net receipts before the tax was extended and that the Supreme Court of the state, the precise point never having been brought before it for decision, failed to criticize the action of the assessing officers. But it is also true that when the court was called upon to decide what the statute meant it decided that it required the tax to be extended upon the full amount of the net receipts without debasement or equalization.

Did that decision operate to *change the law*? Of course not. It merely operated as a declaration *that the law had always been what the court finally decided it to be*. Even when a court overrules its former express decisions it does not thereby *change the law*. It merely declares *that its previous decisions were contrary to law*. That is true as to this court as well as to state courts. Here, however, there have been no express decisions. The most that can be said is that there have been failures to decide a point which was not brought to the court's attention and which it was not asked to decide.

No state ever enters into an agreement that its Supreme Court shall, of its own motion, enforce every statute, or that, if it fails to do so, the State will compensate individuals who have relied upon judicial infallibility and suffered loss.

There has indeed been a change in the law, but that change was made in 1919 by the enactment of the so-called privilege act. But, apparently that is not the change to which the court refers for the court seems to give its approval to that statute and treat it as valid. If it is the law that a change in the burden imposed upon the insurance company could not lawfully be made, it is the statute of 1919 which should be overturned and not that of 1869.

Again the court treats the payment of the tax provided for by the Act of 1919 as a condition *precedent* and as putting the foreign insurance company on a level with a domestic company, and treats the compliance with Section 30 of the Act of 1869 as a condition *subsequent*, if it is a condition at all, and not as one which must be complied with in order to entitle the company to continue the carrying on of its business, whereas, as we have pointed out under Division VIII *post*, pp 60-70, compliance with the Act of 1869, one of its provisions being Section 30, is the condition *precedent* because without such compliance *the company cannot get into the state, or remain in after it gets in*, whereas compliance with the Act of 1919 is a condition *subsequent* because, in case of non-compliance, the company *may be put out of the state*.

Finally, the Court apparently announces the proposition that whatever else, if anything, may be a valid condition subsequent non-performance of which may justify the ejection of the company from the state, a law requiring the payment of a tax *after the company gets in* cannot be a valid condition subsequent even though it is embodied in the very act by which the company gets in.

In considering the value as a precedent of *Southern Railway Company v. Greene*, we must bear in mind that the law there in question had been passed *after the company had come into the state in compliance with its laws in force at the time it came in*; that it was engaged in interstate commerce, that after it came in it had acquired railroad property of a fixed and permanent nature, including railroads; that its admission into the state was for an *unlimited period, and not for a year or other period specified in a license which, if it remained in the state, it was required to renew*. To have permitted the state to impose upon a foreign railroad company a greater tax than that im-

posed upon a domestic company after letting the foreign railroad company come into the state and acquire and operate railroad property upon the same terms as those granted a domestic railroad company, would have put it in its power to commit a gross fraud by practically destroying the value of the company's investment.

This leads us to consider the following statement of the court (p. 7) in the instant case:

"In the present case there is no such permanent investment in the state of Illinois as there was in the *Greene case* in Alabama, but the averments of the bill show that the complainant has from year to year secured renewal of its license in the state of Illinois, and has through many years past built up a large good will in the state of Illinois and has associated with it a large number of agents in various counties of the state, whose connection with it has resulted in a large and profitable business to the complainant, and that it has large numbers of records containing information respecting its policy holders, the character and nature of their policies and other records, the value of all of which would be destroyed if excluded from the state by a denial of the equal protection of the laws. In the *Greene Case* the license was indefinite. In this case it must be renewed from year to year, *but the principle is the same* that pending the period of business permitted by the state, the state must not enforce against its licensees unconditional burdens."

If this reasoning were sound why would it not apply with equal force to a tenant carrying on a prosperous business as a merchant upon premises which he had leased for five years or ten years and had built up a valuable good will, etc., etc., and who. at the end of the term of the lease, found that his landlord had doubled his rent or had decided not to renew

the lease at any price? Yet what court would listen to the plea of the tenant that he be permitted to remain in possession with no increase in rent?

The tenant goes into possession knowing that his tenancy is for a fixed and agreed period and that the lessor can turn him out at the end of the period or force him to pay more rent as a condition of a renewal of the lease. The foreign insurance company comes into the state with knowledge that the state, before the commencement of a new year, may repeal the law or amend it in any form it sees fit with respect to succeeding years. *Fire Association of Philadelphia v. New York*, 119 U. S. 110, 30 L. Ed. 343. In building up a good will, therefore, the foreign insurance company, as well as the tenant, takes a known risk. A new and additional franchise or privilege tax to be applied to a corporation after the franchise under which it has come into the state has expired cannot be successfully assailed after it has entered under a new license or franchise. The law enacting a franchise is a contract which the state cannot impair during the period for which the franchise has been granted, but it does not remain in force after the expiration of that period.

But the question here is not one of the exclusion of the company from the state and the consequent destruction of the value of its good will, records, etc., etc. It is not proposed to exclude the company from the state. All that is intended is to enforce what the Supreme Court of the state has declared has always been the law. Nor is there any showing whatever that such enforcement of the law would result in the destruction of the value of the good will, etc., if the company chose to remain in the state and abide by the law. As is well known an increase of taxation is passed on by the insurance company to those who buy insurance just as the tax on leased real estate is

passed on to the tenant. The insurance company will make just as much money under the large tax as it would under the smaller. The averments of the bill are to the effect that the alleged loss would result if the company *were excluded from the state*, and not that loss would occur if the amount of the company's *payments to the state were increased*.

Finally let us remind the court that in the opinion in the *Greene Case* the court commented upon one of its previous decisions as follows:

"In *Fire Association of Philadelphia v. New York*, 119 U. S. 110, 30 L. Ed. 343, a Pennsylvania corporation, which was taxed in the state of New York, was subjected to a license fee, which license ran for a period of a year, and it was held that the state had the power to change the conditions of admission to the state, and to impose as a condition of doing business in the state, at any time or for the future, the payment of a new or further tax. Mr. Justice Blatchord, speaking for the court, said: 'If it imposes such license fee as a prerequisite for the future, the foreign corporation, until it pays such license fee, is not admitted within the state or within its jurisdiction. It is outside, at the threshold, seeking admission with consent not yet given.' "

The law in question, which was passed in 1875, involved the validity of a retaliatory tax law by which the taxation of a foreign insurance company could be increased beyond that provided by the law admitting it in case the state in which it was organized imposed upon New York insurance companies "taxes, fines, penalties, certificates of authority, license fees, or otherwise," greater than the amount required for such purposes from similar companies of other states by the then existing laws of New York.

The insurance company, which was organized in Pennsylvania, had established an office in New York in

1872 and continued to carry on business there every year thereafter down to 1882. During that time it must also have acquired a good will, etc. In 1873 Pennsylvania passed a law imposing upon foreign insurance companies a three per cent gross receipts tax which was a greater tax than that imposed upon foreign insurance companies by the laws of New York. In 1881 New York sought to impose upon the company the Pennsylvania tax rate and the company resisted on the ground that the imposition of the tax would deprive the company of the equal protection of the laws. The case was very elaborately argued in this court by Mr. Joseph H. Choate who contended, in substance, that as the company had been admitted into the state no such burden could be imposed upon it. This court, however, Mr. Justice Harlan dissenting, sustained the law as valid.

Apart from this the entire argument in support of the application of the *Greene Case* is founded upon the assumption that an acquiescence by taxing authorities of a state in an erroneous construction of the law and the failure of the Supreme Court of the state to correct that construction of its own motion justifies a continuance of such erroneous construction and the characterization of a *future correct construction* as a *change* in the law.

Finally it is to be observed that we are here concerned solely with the tax on plaintiff in error's net receipts for the year commencing May 1, 1922, and ending April 30, 1923. This court is not concerned with the taxes for previous years or with the litigation alleged to be pending for the collection of a large amount of back taxes, nor should the court be influenced by exaggerated statements of the amounts of those back taxes. If, as seems to be the case, the court attaches importance to the question whether the Supreme Court of Illinois has changed its opinion as to the construc-

tion of the statute of 1869, the court should bear in mind that this change, if there was one, occurred prior to May 1, 1922, and consequently plaintiff in error entered the state for the year commencing July 1, 1922, with full notice of it when it obtained its certificate of authority for the year commencing on that date.

Plaintiff in error, however, insists that the decree in this case (Tr. 42) states that the construction of Section 30 which had been adopted and applied by the various assessing officers was first *challenged and questioned* in the case of *People v. Barrett*, 309 Ill. 53, the decision in which, as appears from the printed report, was filed June 20, 1923. Hence it wishes the court to act upon the theory that when it came into the state for the year commencing July 1, 1922, it assumed, and had the right to assume, that the tax would be extended upon the equalized and debased value of the net receipts. The decree, however, does not show when the *Barrett* case was commenced nor at what time during its progress the former construction was *challenged and questioned*. But the record (Tr. 43) shows that the opinion of the court in the *Barrett* case is made by reference a part of the decree as fully as if said opinion were therein recited. Now by referring to the opinion in *Barrett* case we find that the precise point had been decided in *People v. Kent*, 300 Ill. 324, in December, 1921, and in the *Barrett* case the court merely reaffirmed its previous decision in the *Kent* case.

This court takes judicial notice of the printed reports of the decisions of state courts and it judicially knows that the construction now contended for was announced by the Supreme Court of Illinois in December, 1921, anything in the instant case to the contrary notwithstanding.

Before closing our discussion of this point we think we are entitled to suggest that before this court, in support of its conclusion, relies upon the alleged

change made by the Supreme Court of Illinois in its rulings and supposed consequent wrongs to the insurance company resulting therefrom, it should consider carefully its own changes of decision, which changes, if adhered to, will overturn many tax laws framed and enforced many years upon the faith of the prior opinions of the court.

V.

The Tax Provided for by Section 30 of the Act of 1869 Is Not a Property Tax But Is a Privilege or Franchise Tax the Amount of Which Is Computed by Applying to the Amount of the Net Receipts the Property Tax Rate.

The court in the instant case (Opinion 5) has stated that the Supreme Court of Illinois for many years held the tax on net receipts to be a tax on personal property and that in practice the net receipts were treated as personal property and their assessment was by equalization and debasement reduced from full value as all other personal property until the decision *People v. Kent*, 300 Ill. 324, decided in 1921, and *People v. Barrett*, 309 Ill. 53.

The statement of the court as to the practice with respect to the assessment of the net receipts is correct, but the statement as to the holding of the Illinois Supreme Court is not accurate. In neither of the cases of *Walker v. Springfield*, 94 Ill. 364, *City of Chicago v. James*, 114 Ill. 479, and *Chicago v. Phoenix Insurance Company*, 126 Ill. 276, was the court called upon to pass upon a tax assessed under Section 30 of the Act of 1869, nor was there any expression of opinion by the court which might be treated as a statement that the tax was a personal property tax necessary to a decision of either of those cases.

In *National Fire Insurance Company v. Hanberg*,

215 Ill. 378, the court for the first time was called upon to pass upon a tax levied under that act. That case was decided over thirty years after the passage of the Act of 1869 during all which time the foreign fire insurance companies doing business in Illinois, in reporting their net receipts, had not included the amounts paid out for fire losses. The record showed that the company's gross receipts were \$167,240.58, that its fire losses were \$103,137.77, and that its other deductible expenses were \$60,206.40. Consequently if fire losses were not deductible the taxable net receipts were \$107,034.17, but if they were deductible the taxable net receipts were only \$3,896.34. The only question the Supreme Court of Illinois was called upon to decide was whether, in ascertaining net receipts, fire losses could be deducted. The court held they could not be. Not being called upon to express an opinion on any other point it expressed none.

In neither of the subsequent cases prior to *People v. Kent*, 300 Ill. 324, was the court called upon to decide upon the correct method of listing and taxing net receipts. *Courts of last resort usually have enough to do in deciding questions which they are asked to decide without, of their own motion, discovering and deciding other questions.*

In its opinion in the *Kent* case the court reviewed its prior decisions and pointed out that in neither of those cases had it held that the tax provided for by Section 30 of the Act of 1869 was a property tax nor had it in any manner referred to *the character of the tax, the manner of its collection or the question of assessment.* (See extract from court's opinion in *Kent* case, Appendix, *post*, 112.)

This court in the instant case has apparently been misled by the statements in the argument for plaintiff in error as to what the Supreme Court of Illinois had decided prior to the Kent case.

In conclusion upon this point we submit the following:

First. The dictum of a court, no matter what court it is, cannot make that personal property which is not in fact personal property any more than it can make anything else different from what it actually is. Nor can its characterization of a tax as personal property tax make the tax a personal property tax if it is not such in fact. As the court has repeatedly declared that the character of a tax cannot be determined by the name given it either in the statute or in an opinion of the State court (*Choctaw, Oklahoma & Gulf R. C. Co. v. Harrison*, 235 U. S. 292, 59 L. Ed. 234; *St. Louis Cotton Compress Co. v. Arkansas*, 260 U. S. 346, 67 L. Ed. 297) it is of no importance what the statute of the State or its Supreme Court says is the name of this tax and this court is not authorized to treat it as anything else than what it actually is.

Second. The opinions of the Supreme Court of Illinois cited in this court's opinion are not the only opinions of that court which are to be considered. Other opinions of the court in cases in which the question was presented and had to be decided declare a tax on receipts, whether gross or net, not to be a property tax.

In *People v. Thurber*, 13 Ill. 554, the court was called upon to decide upon the validity of provisions of Chapter 64 of the Revised Statutes of Illinois of 1845 which required every agent of a foreign insurance company to pay to the clerk of the county court three per cent of the insurance premiums received by him and required the clerk to pay the same into the State Treasury as revenue of the State. The only tax authorized by the Constitution of 1818, which was then in force, was that specified by Section 80 of Article VIII which provided "that the mode of levying a tax shall be by valuation, so that every person shall

pay a tax in proportion to the valuation of the property which he or she may have in his or her possession." It was insisted that the three per cent exaction was a tax and was invalid because it was not uniform with other property taxation, but the court said:

"This is not a tax upon property, but is a burden imposed upon the agent for the right of exercising a franchise or privilege which the legislature would have the right to withhold or inhibit altogether, and the amount of premiums charged is merely used as a mode of computing the amount to be paid for the exercise of the privilege."

Now it is true that the court in that case was dealing with gross receipts, but it is plain that if *net* receipts are property and subject to property taxation as such *gross* receipts are also property subject to taxation as such.

The decision in the *Thurber case* has never been overruled nor has its soundness ever been called in question. On the contrary it has been cited with approval in subsequent cases.

Thus we have the earliest decision of the Supreme Court of Illinois that a tax on gross receipts is not a property tax and its latest decisions (*People v. Kent*, 30 Ill. 324, *People v. Barrett*, 309 Ill. 53, and *Hanover Fire Insurance Company v. Carr*, 317 Ill. 366) declaring that a tax on net receipts is not a property tax. This court, upon this writ of error, would be bound to follow the latest decisions if the question were one with respect to which the decisions of the State court were absolutely binding. But the question is not necessarily one of that kind, but is one upon which this court must ordinarily exercise its own independent judgment, (*St. Louis Cotton Compress Co. v. Arkansas* 260 U. S. 346, 67 L. Ed. 297).

This court does not exercise its own independent judgment when it disregards its own previous de-

cisions and supports its contrary decision by mere expressions in the opinions of the Supreme Court of Illinois.

Third. Neither a tax on net receipts or on gross receipts can be a property tax. This court has so decided. *Ohio Tax Cases*, 232 U. S. 576, 58 L. Ed. 736; *Choctaw, Oklahoma & Gulf R. R. Co. v. Harrison*, 235 U. S. 292, 59 L. Ed. 234; *Meyer v. Wells Fargo Co.*, 222 U. S. 296, 56 L. Ed. 445; *Pullman Company v. Knott*, 235 U. S. 23, 59, L. Ed. 105; *Oliver Mining Co. v. Lord*, 262 U. S. 172, 56 L. Ed. 430; Brief for Defendant in Error, pp. 38, 42. *Equitable Life Assurance Society v. Pennsylvania*, 238 U. S. 143. This court cannot hold the tax in question to be a property tax without overruling those decisions.

In *Equitable Life Assurance Society v. Pennsylvania*, 238 U. S. 143, the question was whether under the Pennsylvania statute imposing a two per cent tax on the gross premiums of a foreign life insurance company the tax could be imposed upon premiums paid to the company outside the state by residents of Pennsylvania. This court held it could be. In delivering the opinion Mr. Justice Holmes, among other things, said:

“It is argued that this is a property tax. But, as we have said, the Supreme Court of Pennsylvania speaks of it as a tax for the privilege of doing business within the commonwealth and whether the statement is a construction of the Act or not, we agree with it so far, at least, as to assume that if that characterization is necessary to sustain the tax, the legislature meant to avail itself of any power appropriate to that end. * * * The tax is a tax upon a privilege actually used.”

That decision was in accordance with the well established rule that such a construction must be given,

if possible, to a statute as will sustain its constitutionality. But in the instant case the court actually applies the reverse of the rule and holds, in effect, that the tax must be called a personal property tax if calling it that will result in overthrowing the law.

We submit that the characterization of the tax by the Supreme Court of Illinois as a privilege tax must be approved if thereby the law can be sustained.

In this connection we call attention to the Nebraska statute quoted later on (*post* p. 51) providing for the listing and taxation of a foreign insurance company's gross receipts and prescribing that "such gross receipts to be taken as an item of property of that value and to be assessed and taxed on the same basis of such values as other property." The Supreme Court of Nebraska in *State v. Fleming*, 70 Neb. 529, 97 N. W. 1063 held that the tax was a tax on the privilege of doing business and not a property tax and was not one in lieu of all other taxes. All other property of those companies being taxable.

Fourth. The circumstance that the net receipts are required to be listed just as property is listed and that the property tax rate is to be extended upon them is of no importance upon the question whether they actually are personal property or have been treated as such. Foreign insurance companies secure their premium receipts from the property owners of the municipalities in which their agencies are located. As they are not compelled, under the General Revenue Act, to pay any other taxes than the taxes on their net receipts it is only fair that the net receipts tax should be so imposed that these municipalities should receive the same share of the tax that they do of the other taxes which are levied within their jurisdiction. The most convenient method of bringing about this result is that presented by Section 30 of the Act of 1869.

There is no constitutional provision requiring a

privilege tax to be paid into the state treasury, nor any provision prescribing the method by which the amount of it, or the taxing bodies to whom it is to be paid, shall be ascertained or determined. If, then, a tax on net receipts is in fact a privilege tax it cannot be deprived of that character by the adoption of a particular method used in its extension, collection and distribution. ,

Fifth. The tax cannot be a property tax, for the reason that a property tax can only be levied upon property at its value on a specified day and when, on that day, it is actually within the jurisdiction of the state which imposes the tax.

In *Choctaw, Oklahoma & Gulf R. R. Co. v. Harrison*, 235 U. S. 292, 59 L. Ed. 234, where it was contended that a two per cent tax upon the receipts from the production of coal was a tax on property, the court said:

"The requirement is not on account of property owned on a given day, as is the general custom where ad valorem taxes are provided for, and as the Oklahoma laws require, but the manifest purpose is to reach all sales and secure a certain percentage thereof—a method commonly pursued in respect of license and occupation taxes."

The question here is not whether net receipts are personal property. Of course they are personal property while they are in the possession of the insurance company. The real question presented is whether the company's net receipts collected during a period of a year, which are not shown to be in its possession in Illinois on the 30th day of April, or on any other day, but for aught that appears, are outside of the State and beyond its jurisdiction, can, under the Constitution and laws of the State, be assessed and taxed as personal property. The answer to this question presents no difficulty. Neither net receipts nor gross receipts of any individual or corporation not on hand on

the first day of April have ever been treated in Illinois as personal property *for purposes of taxation*. The Constitution and laws of Illinois do not permit them to be so treated. This is true notwithstanding the Supreme Court of Illinois in some of its opinions used expressions to the effect that net receipts were personal property and that the imposition provided for by Section 30 of the Act of 1869 was a tax.

In Illinois the property owner is assessed, not on the amount of money he has received from his business during a given year, either gross or net, but upon the amount he has on hand in this state on the first day of April. On the other hand the insurance company is taxed, not upon its net receipts on hand in this state or any other state on the first day of April, but upon the net receipts during the year ending April 30th. It is not taxed on its net receipts because it *has* them, but because, by means of the exercise of the privilege which the state of Illinois granted it of selling insurance, it has *received* them. In the same way a tax on the gross receipts of sales of any species of property is not a tax because the seller *has* the proceeds of the sale, but because he has *received* them. The same is true of a tax on income.

Sixth. In a subsequent part of the court's opinion in the instant case (p. 13), as we shall now proceed to point out, the court characterizes the tax as an "occupation" tax, which, of course, is the same thing, practically, as a "privilege" tax. The opinion leaves it doubtful what is really the court's conclusion as to the nature of the tax. *This is very important in view of the fact that, as has been repeatedly held, the basis of computing a privilege or occupation tax, or the rate of taxation applied, need not be the same as that used or applied in the case of a property tax. Coulter v. Louisville & Nashville R. Co., 196 U. S. 199, 49 L. Ed. 615.*

Assuming That the Tax Provided for by Section 30 of the Act of 1869 Is of the Character Which This Court Gives It There Is Nothing in This Record to Show That It Is Discriminatory in Its Character.

In the opinion in the instant case (p. 13) the court says:

"An occupation tax imposed upon 100 per cent of the net receipts of foreign insurance companies admitted to do business in Illinois is a heavy discrimination in favor of domestic companies of the same class and in the same business which pay only a tax on the assessment of personal property at a valuation reduced to one-half of 60 per cent of the full value of that property. It is a denial of the equal protection of the laws."

Of course if the tax in question was justified by the power of the State to impose conditions upon foreign insurance companies, it is of no consequence whether it was discriminatory or not. If, however, the State had no power to impose it as a condition, the question remains whether in its operation it was *unlawfully* discriminatory. A finding that it was unlawfully discriminatory is absolutely essential to sustain its decision in the instant case. In considering this question of discrimination it will be useful to ascertain the history of the law.

The first provisions in the laws of Illinois for the taxation of foreign insurance companies were contained in chapter 54 of the Revised Statutes of 1845, (Appendix, *post* 99) the material parts of Section 23 and 24 of which were as follows:

Sec. 23. The said agent or agents (i. e. of the foreign insurance company) shall be required to pay over

to the clerk of the county commissioners' court *three per cent* on the amount of the premiums charged by him on all policies by him issued; * * * and the said clerk shall enter the amount so received in a book kept by him for that purpose; and the said clerk shall, on the first day of January and the first day of July annually * * * make out an abstract of the same, and shall forward said abstract, together with the money on hand, to the treasurer of the State of Illinois * * * and the monies so received shall be considered as revenue to the State, and by the treasurer paid out as such.

Sec. 24. Any agent failing to pay over to the clerk * * * the per cent as directed in this chapter shall subject himself to be fined double the amount of the premium upon which he failed to pay over the per cent as directed in this chapter * * *"

In *People v. Thurber*, 13 Ill. 554, as we have pointed out above (*ante* p. 37), the court held that this was not a property tax, but was a burden imposed upon the agent for the right of exercising a franchise or privilege.

It will be observed that the tax thus imposed was *three per cent* of the premiums received without any deductions of any kind whether for returned premiums or otherwise, and that it was declared to be a tax for revenue purposes. It did not relieve the insurance company from property taxation, if it had any property in the State.

Furthermore the tax was computed upon the *full amount* of the gross receipts instead of upon a *debased and equalized value thereof*. In those days, too, the rate of property taxation was very low, generally not in excess of three per cent of the assessed value of the property. Consequently the three per cent gross receipts tax was much greater in proportion to the property tax than it would have been subsequently

when the property tax rate reached six, seven, eight or even nine per cent.

In 1853 there was substituted for this three per cent tax a provision in the General Revenue Act as a part of the provision for listing property the following:

"Provided that every agency of an insurance company, incorporated by the authority of any other State or government, shall return to the assessor of the county in which the office or agency of such company may be kept, in the month of May, annually, the amount of the gross receipts of such agency, which shall be entered on the tax list of the proper county, and subject to the same rate of taxation for all purposes that other personal property is subject to at the place where located."

See Brief of Plaintiff in Error, pp. 27, 81-84.

It will be observed that this statute required the listing and taxation of *gross* receipts and the imposition thereon of the *property tax rate* instead of a *rate of three per cent*.

Under the law, then in force, all property was required to be listed and assessed at its full cash value, but the practice gradually grew of listing and assessing it at a greatly debased value and in 1869 this practice had become firmly established.

Now in 1869 the provision for taxing the receipts of foreign insurance companies was taken out of the General Revenue Act and inserted in the law governing fire, marine and inland navigation insurance companies and authorizing the admission of foreign companies and became Section 30 of that Act, the one under which the tax now in controversy was levied. But in the new act an important change was made in that the receipts to be listed and taxed were to be *net* receipts instead of *gross* receipts.

Why was this change made if it was not to even up

matters for the foreign insurance companies by reducing their taxation on *the full amount of gross* receipts to one on *the full amount of net* receipts to compensate for the practice by which the property of taxpayers generally was taxed upon a debased valuation?

With this preliminary statement of the history of the law we come to the consideration of the other facts necessary to be considered in determining whether the tax in question is unjustly discriminatory.

Now what are the facts? There is no income tax in Illinois and there is no tax on the net receipts of any individual or corporation other than foreign insurance companies. Individuals are taxed on their real estate and upon their personal property, both tangible and intangible. Domestic insurance corporations are taxed upon their real estate, and tangible personal property, and their capital stock, the tax on the latter being by a method which values it at the excess of the actual or market value of their total shares of capital stock over and above the value of their real estate and tangible personal property and by that means their intangible personal property, such as choses in action, franchises, good will, etc., is reached and subjected to taxation. The good will of a domestic insurance company may be so valuable as to make its total shares of capital stock worth twice the value of its real estate, tangible personal property and its choses in action and other intangibles over and above good will, and, as a consequence a company with a capital stock of \$1,000,000 might be taxed on a valuation of \$1,000,000 for good will alone, and this, too, regardless of whether its good will was acquired through its business in Illinois or elsewhere.

The foreign companies have little, if any, real estate or tangible personal property within the state. They can, and many of them do, carry on business in the state without having therein any taxable property

whatever. Their intangible personal property, including their franchises, good will, etc., of course follows the domicile of the owners and hence is only taxable in the states in which they are organized. It is not and cannot be taxed in Illinois. The complainant's bill in this case does not show that complainant has ever paid any property tax of any kind in Illinois although it does allege (Tr. p. 40) that it "has paid all taxes extended * * * for the year A. D. 1923 for and on account of its property, chattels, goods, effects and credits under the general revenue laws of this State." *But it does not say that any such taxes were actually extended.* In fact there were none.

The statement in the opinion of this court (p. 5) that "both (i. e., foreign and domestic companies) pay on their personal property other than net receipts" is therefore erroneous. The domestic companies *must and do pay*, while the foreign companies *pay or not as they see fit*.

In this connection it is to be observed that the Hanover Company alleges in its bill of complaint (Tr. 15) and the decree recites (Tr. 44) that it has "built up a large *good will* in the state of Illinois, etc." A domestic company's *good will* is subject to taxation and is considered in fixing its capital stock tax, no matter where it is built up, whereas the good will of a foreign company is not taxable in Illinois no matter how valuable it may be or whether its value is attributable, in whole or in part, to the profitableness of its business in Illinois.

The foreign insurance company, therefore, as the record in this case justifies us in assuming, escapes taxation on a large amount of the property which it owns and which, *at least so far as it is good will*, it employs in its business in Illinois, on which class of property the domestic company is taxed. Is not this in itself a sufficient justification for the difference in

the tax rate? *And is it good reasoning to insist that the law in question should be nullified and the foreign insurance company relieved of all taxes other than the "admission fee," because, by permission of the State of Illinois, it has built up in that State a very valuable good will which it now possesses and upon which it pays no taxes?*

In order to determine whether a foreign company is discriminated against is it not necessary to know how the tax upon the entire property of a domestic company compares with the tax upon the net receipts of a foreign company having the same amount of capital stock and doing the same amount of business in Illinois? And where are the facts in this record which will give us this knowledge?

A legislature has, and is presumed to exercise, the power before it enacts a statute to investigate and ascertain all facts necessary to enable it to decide whether the statute, if it becomes a law, will be just and equitable. The presumption is that it does make the necessary investigation. It is not called upon, however, to insert in the law the reasons for its enactment or the facts which justify it.

On the other hand a court, in passing upon the validity of a statute can consider only the facts, if any, disclosed by the record together with matters of common knowledge of which the courts take judicial notice. It is bound to, and should, indulge in the same presumptions in support of the law that it indulges in in support of the judgment of an inferior court in a case where there is no bill of exceptions showing the evidence upon which the lower court acted.

Is it not plain that the facts disclosed by this record, together with all the facts of which the court may take judicial notice, are insufficient to justify the conclusion that the net receipts tax in question, when extended upon the full amount of the net receipts, is

more than a fair equivalent for the other taxes which the foreign insurance company escapes the payment of but which the domestic insurance company is compelled to pay?

What is there to show that the net receipts tax thus excluded is more than a fair equivalent for the franchise tax alone which the domestic company is required to pay and which is included in the capital stock tax?

While it is true that the statutes of Illinois purport to tax the real and tangible personal property of a foreign insurance company, we must give full weight to the fact that these companies can so manage their business that they can escape property taxation. As the court may take judicial notice of "human nature" the court, knowing that people are not inclined to pay any more taxes than they are compelled to, is authorized to presume, and should presume, in the absence of evidence to the contrary, that foreign insurance companies pay no property taxes or at least only an insignificant amount of such taxes in Illinois. On the other hand, domestic companies cannot escape payment of taxes on any of their property. *The legislature of Illinois, in arranging its taxing system, had the right to take these circumstances into account.*

Apparently the court looks upon the net receipts of property as the same thing as the property itself and assumes that a man who pays a rate of taxation on the net receipts of his property pays as much as he would pay if he paid the same rate upon the property itself. It is plain, however, that the net receipts derived from the exercise of the franchise of a corporation are much less than the value of such franchise. And the same is true with respect to the net receipts derived from any property.

The net rental derived from real estate is but a small percentage of the value of such real estate, and the same is true of the gross rental.

The net income derived from the property of a railroad company is considered ample if it amounts to seven per cent, and the gross income of a railroad company rarely, if ever, exceeds thirty per cent of the value of its property.

The interest on money loaned is considered ample if it amounts to six per cent of the principal of the loan. In Illinois the lender is required by law to pay the property tax rate upon the equalized and debased value of the full amount of the loan, which value is 30 per cent thereof, instead of upon *the amount of the interest he realizes on it*.

The net receipts of a merchant amount to but a small percentage of the taxable capital he employs in his business.

The net receipts of the Hanover Company for the year in question, as found in the decree (Tr. p. 35) were \$90,824. These were its net receipts in Cook County where it derived at least 80 per cent of the net receipts from its business in the entire state. We may safely assume that its total net receipts for the entire state did not exceed \$115,000. It is apparent that the extension of a tax upon this \$115,000 would not impose upon the company as large a tax as that which would be imposed upon the debased and equalized value of the property of a domestic corporation having the same amount of capital stock as the Hanover Company and doing as large a business as that company.

Again, there is nothing in the record to show how valuable the privilege of the Hanover Company was nor how it compared with the value of the franchise of a domestic company having a like capital. The value of the shares of the capital stock of the Hanover Company is not shown and hence cannot be compared with the value of the shares of the capital stock of other companies.

How, then, are we to decide that taxing a foreign

insurance company on the full amount of its net receipts, the company not paying any other tax, and not taxing a domestic company upon its net receipts but upon 30 per cent of the value of all its property, tangible and intangible, is a discrimination against the foreign insurance company?

In this connection we call attention to the laws of Nebraska and the changes therein made with respect to the taxation of foreign insurance companies.

The Nebraska Act of 1887 (compiled Statutes of 1887, Sec. 38, Ch. 77) provided as follows:

“Each and every insurance company transacting business in this state shall be taxed upon the excess of premiums received over losses and ordinary expenses incurred within this state during the year previous to the year of listing in the county where the agent conducts the business properly proportioned by the company at the same rate that all other personal property is taxed and the agent shall render the list and be liable for the tax * * * Insurance companies shall be subject to no other tax, fees or license under the laws of this state, except taxes on real estate and the fees imposed by the Section 22 of an Act regulating insurance companies passed February 25th, 1873.”

This tax, it will be seen, was a tax on the net profits of the insurance company remaining after deducting expenses and losses. If the company made no profits it paid no taxes other than taxes on real estate if it had any. Furthermore it would seem that the method of valuing property for taxation purposes was intended to be applied to the net receipt tax.

This method of taxation evidently proved unsatisfactory and there was substituted for it Section 66 of the Insurance Act now in force, which is as follows:

“Each and every fire insurance company organized under the laws of any other state or country

and transacting business in this state shall be taxed in the county, town, city, village and school district where the agent conducts the business, upon the *gross amount of premiums received by it for the preceding year*, such *gross* receipts to be taken as an item of property of that value and to be assessed and taxed on the same percentage of such value as other property. The agent shall render the list and be personally liable for the tax. If he refuses to render the list or to make affidavit that the same is correct, the amount may be valued and assessed according to the best information of the assessor."

As we have already pointed out (*ante* p. 40) the Supreme Court of Nebraska, in *State v. Fleming*, 70 Neb. 529, 97 N. W. 1063, held that this tax was not a property tax but a privilege tax.

While it is not practicable to state with accuracy what proportion of the *gross* receipts of a fire insurance company are *net* receipts it is certainly within bounds to say that the proportion is less than one half, and that this is true in Nebraska as well as in Illinois. Besides, as the proportion of net receipts to gross receipts varies from year to year, both the state and the insurance company may be presumed to take this into account, the state when it passes the law and the company when it impliedly accepts its provisions. It follows from this that if it were required that the Illinois tax should be extended upon the **amount** of the *net* receipts after debasement and equalization and that the Nebraska tax should be extended upon the **amount** of the *gross* receipts, after debasement and equalization, one or the other of these statutes would be discriminatory either in favor of domestic companies and against foreign companies or in favor of foreign companies and against domestic companies. A discrimination against a domestic company would, of course, be as much a violation of the

Fourteenth Amendment as a discrimination against a foreign company.

All of this goes to show that when the court declares that "a tax imposed upon 100 per cent of the net receipts of foreign insurance companies admitted to do business in Illinois is a heavy discrimination in favor of domestic companies" it is merely guessing, and that is not justifiable.

It must be remembered that the plaintiff in error in this case is the actor. It alleges unlawful discrimination which is an affirmative allegation requiring proof. It has been held repeatedly by this court that where unjust discrimination is alleged and where, in order to determine whether it exists, facts not shown by the record are necessary are to be considered, the claim of unjust discrimination cannot be allowed. While the familiarity of the court with its own decisions renders a citation of authority on this point unnecessary, we will take the liberty of calling the court's attention to one of them.

In *Quong Wing v. Kirkendall*, 223 U. S. 58, 59, 56 L. Ed. 350, a Montana law imposed a license fee upon all persons engaged in the laundry business other than the steam laundry business, with a proviso that it should not apply to women so engaged, when not more than two women were employed. In sustaining the law Mr. Justice Holmes, in delivering the opinion of the court, after referring to the power of the state to make discriminations, if founded on distinctions that the court cannot pronounce unreasonable and purely arbitrary, said:

"Another difficulty suggested by the statute is that it is impossible not to ask whether it is not aimed at the Chinese, which would be a discrimination that the Constitution does not allow * * * It may or may not be that if the facts were called to our attention in the proper way the objection

would prove to be real. * * * *There are many things that courts would notice if brought before them that before hand they do not know. It rests with counsel to take the proper steps, and if they deliberately omit them, we do not feel called upon to institute inquiries of our own.*"

Mr. Justice Hughes and Mr. Justice Lamar dissented. The "man on the street" would entertain a very strong suspicion that the Chinese were aimed at but the court could not see it "with its judicial eye."

We submit, therefore, that the only facts appearing being that the foreign company is taxed only on its net receipts while the domestic company is taxed on its real and personal property and it not appearing that one tax is not the equivalent of the other the plaintiff in error's case would fail even if there were no other objections to it.

It is also to be borne in mind that in determining whether the tax provided for by Section 30 of the Act of 1869 is discriminatory as against a foreign insurance company the court cannot take into account the tax provided for by the Act of 1919. It cannot add together the two forms of taxes for the purpose of determining whether the total amount paid by the foreign insurance company exceeds the total amount paid by a domestic insurance company doing the same amount of business.

A privilege tax imposed as a condition precedent to the admission of a foreign insurance company, no matter how high it may be, cannot be assailed although its amount may be many times the total amount of taxes of all kinds imposed upon a domestic company of the same kind. Upon that point the court in this instant case (p. 8) says:

"With respect to the *admission fee*, so to speak, which the foreign corporation must pay to become

a *quasi* citizen of the state and entitled to equal privileges with citizens of the state, *the measure of the burden is in the discretion of the state and any inequality as between the foreign corporation and the domestic corporation in that regard does not come within the inhibition of the Fourteenth Amendment.*"

Leaving out of account, therefore, the tax imposed by the Act of 1919 the facts alleged in the bill and recited in the decree do not justify a finding that the tax provided for by Section 30 of the Act of 1869 is discriminatory even upon the theory that that tax could not include any amount as compensation for the privilege granted the company of transacting business in the state.

The question whether a tax is discriminatory even when all the facts necessary to be considered are shown by the record has proven to be a somewhat difficult one to determine. How it is to be determined in the individual case appears to be dependent not upon the application of a system of reasoning which will commend itself to all men of ordinary intelligence, but upon the particular views of the judges who render the decision. All judges do not entertain the same particular views and consequently we have a considerable number of decisions made by a divided court. The members of a legislature who entered upon the task of framing tax legislation, in order to perform the work with any degree of confidence that the law they enacted would be valid, would have to be able to foresee what particular views would be entertained by the judges of the court of last resort then in office as well as by those who might succeed them.

While the members of the court are, of course, familiar with these decisions it will not be out of place to remind them of what they have heretofore decided in

order to render it easier to compare those decisions with that rendered in the instant case.

In *Bell's Gap Railroad Company v. Pennsylvania*, 134 U. S. 232, 38 L. Ed. 892, the court, speaking through Mr. Justice Bradley, said:

"The provision in the Fourteenth Amendment, that no state shall deny to any person within its jurisdiction the equal protection of the laws was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. * * * We think we are safe in saying that the Fourteenth Amendment was not intended to compel the state to adopt an iron rule of taxation."

In *Pacific Express Co. v. Seibert*, 142 U. S. 339, 35 L. Ed. 1035, a distinction, for taxing purposes, between express companies which owned their own means of transportation and those who engaged for hire a railroad or steamship company to transport their merchandise was supported.

In *Travelers' Ins. Co. v. Connecticut*, 185 U. S. 364, 46 L. Ed. 949, a law of a state was sustained which imposed a tax on the stock of non-residents in corporations and exempted the stock of residents.

In *King v. Mullins*, 171 U. S. 404, 435, 43 L. Ed. 214, 226, a distinction was made in the taxing system of the state between tracts of 1,000 acres or less and tracts of more than 1,000 acres. The law was sustained.

In *Clement National Bank v. Vermont*, 231 U. S. 120, 58 L. Ed. 147, it was held that depositors in National Banks were not denied the equal protection of the laws by a Vermont law which imposed a tax upon interest-bearing deposits in such banks because depositors in state banking institutions were exempted from taxation on their deposits up to \$2,000, such institutions paying a franchise tax upon the average amount of de-

posits after deducting deposits in excess of \$2,000 upon which the depositors are taxable locally, nor because of exemptions which such statute makes in favor of municipalities, corporations organized solely for charitable, educational or religious purposes, nor because persons whose deposits do not bear interest in excess of 2 per cent per annum are also exempted.

In *Citizens Telephone Company v. Fuller*, 229 U. S. 322, 57 L. Ed. 1206, it is held that exempting the property of telephone companies whose gross receipts for the year do not exceed \$500 from the ad valorem tax imposed on other companies does not render a law in conflict with the equal protection of the laws clause of the Fourteenth Amendment. Mr. Justice McKenna, in delivering the opinion of the court, after stating the facts, said:

“It is manifest, therefore, that there are marked differences between the taxed and the non-taxed companies and the difference might be pronounced arbitrary, if the rule urged by appellant should be applied; that is, that in the taxation of property no circumstance should be considered but its value; or, to use appellant’s words, ‘each dollar’s worth should be treated alike.’ But such rigid equality has not been enforced. In Michigan the legislature has the power of prescribing the subjects of taxation and exemption, notwithstanding the Constitution of the state requires the legislature to provide a uniform rule of taxation, except upon property paying specific taxes. * * * The power of exemption would seem to imply the power of discrimination, and in taxation, as in other matters of legislation, classification is within the competency of the legislature. We said in *American Sugar Refining Company v. Louisiana*, 179 U. S. 89, 92, 45 L. Ed. 102, 103, that time out of mind it has been the policy of this government to classify for the purposes of taxation, and a discrimination was supported between taxation of

producers and manufacturers of products; and yet in *Billings v. Illinois*, 188 U. S. 97, 142, 47 L. Ed. 400, 403, we compared the rule with that in *Connelly v. Sewer Pipe Co.*, 184 U. S. 540, 46 L. Ed. 679, where a distinction between buyers of products and producers of them was held an illegal discrimination.

"It may, therefore, be said that in taxation there is a broader power of classification than in some other exercises of legislation."

In *Northwestern Mutual Life Ins. Co. v. Wisconsin*, 247 U. S. 132, 62 L. Ed. 1025, the court sustained a law of Wisconsin which imposed upon a domestic life insurance company, in lieu of all other taxes upon the personal property of the company in the state, three per cent of its gross income from all sources less income from rents of real property upon which taxes had been paid and less premiums collected outside of the state on policies held by non-residents, while foreign companies of like character paid only an annual privilege or occupation tax of \$300. The court could see no reason for holding that the Wisconsin corporation was denied the equal protection of the laws, although the effect of the law was to allow a foreign life insurance company to escape all taxation excepting the trifling "admission fee" of \$300.

In *Travis v. Yale & Towne Mfg. Co.*, 252 U. S. 60, 64 L. Ed. 460, the court held that there is no unconstitutional discrimination against citizens of other states in a state license tax law merely because it confines the deduction of expenses, losses, etc., in the case of non-resident taxpayers, to such as are connected with income arising from sources within the taxing state.

In *Fort Smith Lumber Co. v. Arkansas*, 251 U. S. 532, 64 L. Ed. 532, the suit was brought by the state of Arkansas to recover back taxes from a corporation of

that state alleged to be due upon a proper valuation of its capital stock. The corporation owned stock in two other corporations of the state, each of which paid full taxes, and it contended that it was entitled to omit the value of such stock from the valuation of its own. The corporation defended on the ground that individuals are not taxed for such stock or subject to suit for back taxes. The court, speaking through Mr. Justice Holmes, said:

“The objection to the taxation as double may be laid on one side. That is a matter of state law alone. The Fourteenth Amendment no more forbids double taxation than it does doubling the amount of the tax, short of confiscation or proceeding unconstitutional on other grounds. *Davidson v. New Orleans*, 96 U. S. 97, 106, 24 L. Ed. 616, 620; *Tennessee v. Whitworth*, 117 U. S. 129, 136, 29 L. Ed. 830; *St. Louis Southwestern R. Co. v. Arkansas*, 238 U. S. 350, 367, 368, 59 L. Ed. 265. We are of opinion that it is also within the power of a state, so far as the Constitution of the United States is concerned, to tax its own corporations in respect of stock held by them in other domestic corporations, although unincorporated stockholders are exempt. A state may have a policy in taxation. *Quong Wing v. Kirkendall*, 223 U. S. 59, 63, 56 L. Ed. 350. If the state of Arkansas wished to discourage, but not forbid, the holding of stock in one corporation by another, and sought to attain the result by this tax, or if it simply sought to make corporations pay for the privilege, there would be nothing in the Constitution to hinder. A discrimination between corporations and individuals with regard to a tax like this cannot be pronounced arbitrary, although we may not know the precise ground of policy that led the state to insert the distinction in the law.

“The same is true with regard to confining the right of recovery of back taxes to those due from corporations. It is to be presumed, until the con-

trary appears, that there were reasons for more strenuous efforts to collect admitted dues from corporations than in other cases, and we cannot pronounce it an unlawful policy on the part of the state. See *New York v. Barker*, 179 U. S. 279, 45 L. Ed. 190, 193."

Mr. Justice McKenna, Mr. Justice Day, Mr. Justice Van Devanter and Mr. Justice McReynolds dissented.

In *Coulter v. Louisville & Nashville R. R. Co.*, 196 U. S. 599, 49 L. Ed. 615, Mr. Justice Holmes, in delivering the opinion of the court, says:

"If it be a fact that the franchise of a Kentucky corporation is taxed at a different rate from the tangible property in the State, there can be no question that *the State had the power to tax it at a different rate, so far as the Constitution of the United States is concerned.* *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, L. Ed. 892; *Merchants & M. Bank v. Pennsylvania*, 167 U. S. 461, 464; *Magonu v. Illinois Trust & Savings Bank*, 170 U. S. 283, 295, 42 L. Ed. 236, 237."

If the Constitution of the United States does not prohibit the taxation of the franchise of a Kentucky corporation at a different rate than that applied to tangible property in that State, the same Constitution, including, of course, the Fourteenth Amendment, being in force in Illinois, why does it prohibit the State of Illinois from imposing a tax upon the net receipts of a foreign insurance company different from that imposed upon the property, tangible and intangible, of a domestic insurance company?

The court in its opinion (p. 12) assumes that domestic companies retain their net receipts and reinvest them and thus have the property in which they are invested on hand on the day fixed by law for the assessment of property. But they may or may not have them on hand on that day. They may or may

not have distributed them to their stockholders who are taxed on them and hence the companies may have no property in which they have been invested.

There can be no possible objection to imposing a business tax on a foreign insurance company when no such tax is imposed upon a domestic insurance company. The marked differences between the situation of the two classes of companies with respect to property taxation justifies such discrimination between them.

In any event, it is clear, this record does not show that the distinction between the taxation of the foreign company and that of the domestic is unreasonable and purely arbitrary. *Quong Wing v. Kirken-dall*, 223 U. S. 58, 56 L. Ed. 350.

If we are correct in this it follows that if the net receipts tax in question was imposed purely as a revenue tax *in invitum* and was not designed to be in whole or in part compensation for a privilege granted it should have been sustained.

In nearly all, if not in all, of the cases we have thus cited the laws in question were laws imposing taxation *in invitum*. In the instant case, however, the tax is not of that character. On the contrary it is a tax which, as we have shown, the Hanover Insurance Company, by availing itself of the benefits of the Act of 1869, *agreed to pay*. Its right to pay any amount of money it saw fit in order to carry on business in Illinois was as absolute as the right of any individual *sui juris* to pay whatever price he saw fit for property which he wished to acquire. There is no more reason for the interference of the court to protect the Hanover Company from its agreement to pay more for the privilege it acquired than it now thinks the privilege is worth, than there would be for the interference of the court in every case of the purchase of property to de-

cide that the purchase price was too high and relieve the purchaser from the terms of the agreement which he entered into voluntarily and with his eyes open.

After all is said and done what the court has decided is nothing more nor less than that the Hanover Company agreed to pay for the privilege granted it more than the privilege was worth; and because it so agreed, it should not be held to the bargain it made.

VII.

The Validity of the Burden Imposed Upon the Foreign Insurance Company Cannot Be Made to Depend Upon the Method Prescribed for Computing Its Amount.

In *Home Insurance Company v. New York*, 134 U. S. 594, 33 L. Ed. 1025, the court in dealing with a franchise tax, say:

“The validity of this tax can in no way be dependent upon the mode which the state may see fit to adopt in fixing the amount for any year.”

In *Maine v. Grand Trunk R. Co.*, 142 U. S. 217, 35 L. Ed. 994, the court say:

“The validity of this tax can in no way be dependent upon the mode which the state may see fit to adopt in fixing the amount for any year which it shall exact for the franchise.”

In *Equitable Life Assurance Society v. Pennsylvania*, 238 U. S. 143, where the question was whether premium receipts paid outside of Pennsylvania by residents of Pennsylvania could be taken into account in computing the two per cent tax on the gross premiums of the foreign insurance company, Mr. Justice Holmes, in delivering the opinion of the court, said:

"We are dealing with a corporation which has subjected itself to the jurisdiction of the state; there is no question that the state has a right to tax it, and the only doubt is whether it may take this item into account in fixing the figure of the tax * * * The tax is a tax upon a privilege actually used * * * The only question concerns the mode of measuring the tax * * * As to that a certain latitude must be allowed. * * * Taxation has to be determined by general principles, and it seems to us impossible to say that the rule adopted in Pennsylvania goes beyond what the constitution allows."

Down to the time the decision in the instant case the soundness of the proposition had never been disputed nor qualified excepting to the extent that the tax must not be so levied as to operate as a burden upon the interstate commerce of a foreign corporation. But now a different proposition is put forward.

In the instant case (Opinion p. 8) the court says:

"In subjecting a law of the state which imposes a charge upon foreign corporations to the test whether such a charge violates the equal protection clause of the Fourteenth Amendment, *a line has to be drawn between the burden imposed by the state for the license or privilege to do business in the state and the tax burden which, having secured the right to do business, the foreign corporation must share with all the corporations and other taxpayers of the state.* With respect to the admission free, so to speak, which the foreign corporation must pay to become a quasi citizen of the state and entitled to equal privileges with citizens of the state, *the measure of the burden is in the discretion of the state and any inequality as between the foreign corporation and the domestic corporation in that regard does not come within the inhibition of the Fourteenth Amendment*; but after its admission, the foreign corporation stands equal and is to be classed with domestic corporations of the same kind."

With respect to these conclusions of the court we make the following suggestions:

First. We readily admit that *to sustain the decision of the court* it is necessary to draw the line thus indicated. But what words of the Fourteenth Amendment justify or require it? A line can only be drawn if sound reasoning demands it. *It cannot be drawn merely because the decision of a court cannot be supported without it.* What warrant is there for drawing the line between one form of money burden imposed upon the foreign corporation and another form of money burden when the burden is prescribed by the very law which provides for the admission of the corporation into the state? As we have already pointed out (*ante* pp. 4-14), according to the decisions of this court in *Orient Insurance Co. v. Daggs*, 172 U. S. 557, 43 L. Ed. 552; *Ashley v. Ryan*, 153 U. S. 436, 443, 38 L. Ed. 773, 777; *Grand Rapids & Indiana Ry. Co. v. Osborne*, 193 U. S. 17, 48 L. Ed. 548; *Newburyport Water Co. v. Newburyport*, 193 U. S. 561, 579, 48 L. Ed. 795; *Interstate Consolidated Railway Co. v. Massachusetts*, 207 U. S. 79, 52 L. Ed. 111, and *Kansas City, Memphis & Birmingham R. R. Co. v. Stiles*, 242 U. S. 111-120, 61 L. Ed. 176-187 (all of which must be regarded as overruled if the decision in the instant case is allowed to stand) a corporation organizing under a state law cannot be permitted to question the constitutionality of provisions of the law imposing burdens upon it. Apart from this to hold that the validity of an agreement to pay a sum of money as the price of a privilege which the grantor has the right to sell or not depends upon the name given the payment, or the method in which its amount is to be arrived at, or the time when it is required to be paid, is to disregard the rule that substance and not form is to be considered.

Second. The court concedes that so far as the so-

called *admission fee* is concerned the amount to be exacted is for the state alone to decide and the power of the state is not controlled by the Fourteenth Amendment. If, then, we assume that the two per cent gross receipts tax provided for by the Act of 1919 is to be regarded as the *admission fee*, and that Act had fixed the admission fee at *six* per cent or even *ten* per cent of the gross receipts for the preceding calendar year, the Hanover Company could not have successfully invoked the Fourteenth Amendment to defeat the collection of the tax, although the tax would have amounted to a much larger sum than the sum of the two per cent tax under the Act of 1919 and the net receipts tax under Section 30 of the Act of 1869 combined.

Is the lessor of property to be condemned because, instead of requiring all the rent to be paid in advance, he permits payment of part of it to be delayed until the expiration of the term or because he adopts one mode of computing the advance payment and another mode of computing the remaining payment?

It must be remembered that both under the Act of 1919 and under the Act of 1869 the tax is computed upon the receipts of a past year. What, then, would have been said as to the validity of the law if it had provided that in addition to the two per cent tax on gross receipts the foreign company, as a further condition *precedent* to its receiving its license for the ensuing year, should pay as a tax on its net receipts of the past year a sum arrived at by computing upon them the property tax rate for such year? *Did not the Act of 1919 in fact so provide when it declared that its provision for the privilege tax should not be construed to prohibit the levying of the tax provided for by Section 30 of the Act of 1869? Should the manner of computing the tax condemn it?*

Third. The court further distinguishes between a

case where a law providing for the foreign company's admission requires the payment of compensation in advance for the privilege and a law which, though prescribing the character of the compensation and the manner in which the amount is to be computed, provides that payment is to be made after the privilege has been exercised and its profitableness or unprofitableness has been ascertained.

Is such method of reasoning sound? If it is, as we shall hereinafter show, it invalidates the tax laws of many of the states providing for the taxation of foreign fire insurance companies.

Suppose the state, instead of relying upon the acceptance by the company of the privilege as an implied agreement to make the prescribed payment after the privilege had been exercised, had required the company to execute a bond with sureties binding itself to make the payment, would the court have declared the bond void and unenforceable?

Surely the court, in reaching a conclusion which it thinks is necessary to prevent injustice, should not disregard salutary and well recognized rules of reasoning.

VIII

A Foreign Insurance Company Secures Its Admission Into the State of Illinois by the Act of 1869 and Not by the So-Called Privilege Act of 1919, and the Adoption of the Act of 1919 Cannot Be Availed of to Impair the Obligation of Section 30 of the Act of 1869.

The court, we submit, has misapprehended the nature and effect of the Acts of 1869 and 1919 and construed the Act of 1869 as intended to impose a condition *subsequent* and the act of 1919 as imposing a con-

dition *precedent* and has assumed that the insurance company secures admission into the state by compliance with the act of 1919. Now what are the facts?

First. Prior to 1919 there was no law in Illinois imposing either gross receipts or net receipts taxes upon any other foreign insurance companies than fire, marine and inland navigation insurance companies. For reasons which the legislature deemed sufficient, and which the courts have no lawful right to enquire into, foreign life insurance and casualty insurance companies were subjected only to the property taxes to which other property owners were subjected. Whether this was because it was deemed best to encourage such companies to come into the state, or whether such companies were not supposed to derive the advantages of carrying on business in Illinois that were derived by fire, marine and inland navigation companies, is immaterial. One thing, however, is apparent and that is that it was considered that a heavier rate of taxation should be imposed upon fire, marine and inland navigation insurance companies than should be imposed upon the other classes of companies.

Prior to 1919 the expenses of the Illinois State Government had begun to increase and it became necessary to look around for new subjects of taxation for state purposes. The result was that it was decided to impose a privilege tax on all foreign insurance companies, and, to preserve the policy of taxing foreign fire, marine and inland navigation insurance at a greater rate than the other companies were taxed, the Act of 1919 was passed and the gross receipts tax there provided for was made applicable to foreign fire, marine and inland navigation insurance companies as well as to the other companies. That the legislature intended to continue its policy of discrimination against these companies is shown by the con-

cluding clause of Section 1 of the Act of 1919, which provides, in effect, that the privilege tax shall be in addition to the tax imposed under Section 30 of the Act of 1869 and that the latter shall remain in full force.

The Act of 1919 contains no provision whatever for the *admission* of foreign insurance companies. It deals only with companies *already admitted by compliance with the provisions of the Act of 1869*. It is true Section 15 of the Act of 1919 provides that "the authority of each non-resident corporation * * * admitted to do an insurance business in this state, shall be evidenced by a license to be issued by the Department of Trade and Commerce" (the latter being the successor in office of the Insurance Superintendent), but such license is the "certificate of authority" provided for by Section 22 of the Act of 1869. This is the construction given by the Supreme Court of Illinois to the two Acts. The Act of 1919 is a mere supplement to the Act of 1869. Wipe out the latter and the former would go with it. (See Brief for Defendant in Error, Appendix pp. 98-101.)

Second. The tax provided for by the Act of 1919 is based upon the company's gross receipts for the *preceding* calendar year. Thus the tax payable during the year commencing July 1, 1922, is based upon the gross receipts for the calendar year 1921. This is conclusive evidence of the fact that act was intended, not for the admission of the companies into the state, but for the taxation of those which had already obtained admission. The tax provided for by the Act of 1869 is also imposed upon a *past* year's net receipts.

Third. The payment of the tax provided for by the Act of 1919 is not a condition *precedent* to the admission of the company into the state. The company is not required to pay it until after it has received its license and until the lapse of one month of the year

covered by the license. (See Sec. 10, Brief for Defendant in Error, Appendix, p. 102.) On the other hand by the terms of Section 22 of the Act of 1869 (Brief for Defendant in Error, Appendix, p. 81) *compliance with all the terms of Section 30 which includes the making of all agents' returns and the payment of all taxes which have been extended is necessary to enable the company to secure the necessary authority or license for the transaction of business. When the certificate of authority or license has been issued then, and not until then, does the privilege tax provided for by the Act of 1919 become payable.*

Fourth. The failure of the company to make the report or pay the tax provided for by the Act of 1919 is punishable *by the revocation of its license already issued* (See Sec. 12, Brief for Defendant in Error, Appendix, p. 102), while the failure to comply with Section 30 of the Act of 1869 is punishable *by the refusal to grant it a license.* (See Sec. 22, Brief for Defendant in Error, Appendix, p. 81.)

We are dealing, therefore, with a case very different from that assumed by the court in its opinion. The case assumed in the opinion is one of the admission of the insurance company by compliance with the terms of the Act of 1919 as conditions *precedent* and the imposition upon the insurance company by the Act of 1869 of conditions *subsequent*. The fact is that the company *can't get into the state without complying with the provisions of the Act of 1869*, and, if it gets in, *it can't remain in without complying with the provisions of the Act of 1919.*

Fifth. The enactment of the Act of 1919 cannot be used as a means of destroying the validity of Section 30 of the Act of 1869, for Section 1 of the Act of 1919 expressly declares that it shall not have that effect. (See Appendix to Brief for Defendant in Error, p. 99.)

Yet, if the opinion of this court is sound, from 1869 down to 1919 there has never been any valid law in Illinois for taxing foreign fire insurance companies other than that providing for the property tax which is of no force because the insurance companies can evade the tax by having in the state on the first of April of each year no taxable property.

Is it not marvelous that this condition of things should have existed for fifty years without being discovered and that its final discovery was brought about by dissatisfaction of the insurance companies with the construction placed upon the law by the Supreme Court of Illinois?

If this court's opinion in the instant case is to be construed as holding that the adoption of the Act of 1919 nullified Section 30 of the Act of 1869 all the laws Illinois has, aside from the Act of 1919, if the Act of 1869 is annulled, is the Fire Department Tax Act of 1895 (See Appendix to Brief for Defendant in Error, pp. 90-92), but if the opinion of the court in the instant case is to be construed as invalidating all laws in which the tax is assessed and made payable *after* the foreign insurance company *gets into the State* the Act of 1895 is also invalid because the tax there provided for is not imposed upon domestic insurance companies unless the benefit of it is saved by the provision in the Act of 1919 that the insurance companies, if they do not pay the Fire Department Tax, cannot deduct it from the gross receipts privilege tax.

The same kind of a fire department tax is imposed upon foreign insurance companies in a large number of states of the Union and if the Illinois law is invalid they are all invalid.

IX

Compliance With Section 30 of the Act of 1869 Is One

of the Conditions Upon Which a Foreign Insurance Company Is Permitted to Carry on Business in Illinois.

The Supreme Court of Illinois in *Hanover Fire Insurance Company v. Carr*, 317 Ill. 366, 373, 374, affirms this proposition, but this court, in the instant case (p. 9), denies it, and, in doing so, among other things, says:

"While we may not question the meaning of the tax law as interpreted by the court in the manner and effect in which it is to be enforced, we must re-examine the question passed upon by the state court as to whether the law complained of is a part of the condition upon which admission to do business in the state is permitted *and is merely a regulating license by the state to protect the state and its citizens in dealing with such corporation, or whether it is a tax law for the purpose of securing contributions to the revenue of the state as they are made by other taxpayers of the state.* Our power and duty in this regard must follow from our decisions, and while the exact question has not heretofore been considered, there can be no doubt that our conclusion finds its complete support in the analogies of other cases in which we have had to determine what our duty is in dealing with the alleged invalidity of state legislation. *Bailey v. Alabama*, 219 U. S. 219, 239; *Corn Products Co. v. Eddy*, 249 U. S. 427, 432; *Appleby v. New York*, (June 1, 1926); *Truax v. Corrigan*, 257 U. S. 312, 324, 325. What, therefore, we have to decide here is whether the application of Section 30 can be one of the conditions upon which the insurance company is admitted to do business in Illinois, or whether, *under the law of 1919, the authority granted by the Department of Trade and Commerce for which the Company paid 2 per cent of the gross premiums received the previous year by it*, put it upon a level with domestic companies doing business of the same character."

The court then proceeds to conclude that the pay-

ment of the tax in question is not one of the conditions under which the company is permitted to do business but that the tax is a personal property tax levied under the general revenue laws of the State. Further on in its opinion (p. 11) the court says:

Of course at the end of the year for which the license has been granted, the State may, in its discretion, impose as conditions precedent for a renewed license past compliance with its valid laws; but that does not enable the State to make past compliance with Section 30 a condition precedent to a renewal of the license, if, as we find, that section violates the Fourteenth Amendment, for as already said, while a state may forbid a foreign corporation to do business within its jurisdiction, or continue it, it may not do so by imposing on a corporation a sacrifice of its constitutional rights."

These conclusions, we respectfully submit, are erroneous for the following reasons:

FIRST. *This court in its previous decisions has held that whether a provision is a condition is a matter of construction to be decided by the state court.*

In *Orient Insurance Co. v. Daggs*, 172 U. S. 557, 43 L. Ed. 552, the court sustained a statute applicable to fire insurance only which made the entire amount of the insurance payable in case of total loss, except as reduced by depreciation of the property after it was insured. In the opinion Mr. Justice McKenna, speaking for the court, said:

"It is urged that the statute is not made a condition upon foreign corporations, but *this view is not open to our acceptance. The Supreme Court of Missouri, exercising its function of interpretation, decides that it is*, but we do not care to enter fully into the subject of conditions on corporations, foreign or domestic. The statute is sustained on the grounds that we have given."

The cases cited in the opinion in the instant case, as delivered by Mr. Chief Justice Taft, do not sustain the court's conclusion that it can disregard the decision of the Supreme Court of Illinois that compliance with Section 30 of the Act of 1869 is a condition upon which a foreign insurance company can be permitted to carry on business in that state. We will briefly refer to these cases.

In *Baily v. Alabama*, 219 U. S. 219, 239, 55 L. Ed. 191, there were not involved the rights of a foreign corporation under the Fourteenth Amendment but the rights of an individual under the Thirteenth Amendment, and the question was not whether the provision of the law in question was a condition, but it was, whatever the provision might be called, what was its effect, and whether, in view of its effect, it was in violation of the Thirteenth Amendment. *There was no claim of right by this court to disregard a construction put upon the law by the state court.*

It may be remarked in this connection that Mr. Justice Holmes and Mr. Justice Lurton dissented from the conclusion reached by the court.

In *Corn Products Refining Company v. Eddy*, 249 U. S. 427, 63 L. Ed. 689, there was no question as to whether a statutory requirement imposed was a condition, but the question was whether the requirement was one which was in violation of the Fourteenth Amendment, the court saying:

"In cases of this kind we are concerned not with the characterization or construction of the State law of the State court, nor even with the question whether it has in terms been construed, but solely with the effect and operation of the law AS PUT IN FORCE BY THE STATE."

In *Appleby v. New York*, decided June 1, 1926, the questions, as stated in the opinion, as delivered by

Mr. Chief Justice Taft, were, first, was there a contract, second, what was its proper construction and effect, and third, was its obligation impaired by subsequent legislation as enforced by the State court? The court said:

"These questions we must answer independently of the conclusion of that court. Of course we should give all proper weight to its judgment, but we cannot perform our duty to enforce the guaranty of the Federal constitution *as to the inviolability of contracts by State* LEGISLATIVE ACTION unless we give the question independent consideration."

There is very great difference between the construction of a *contract* and the construction of a *law* of a state. This court has always claimed, and properly claimed, the right to determine the proper construction of a *contract* in a case where the question involved was *whether there was an impairment of it by subsequent legislation*, but it has, without exception, *until the instant case*, admitted its want of power to review the decision of a state court upon the construction of a *law*. It has always, until now, limited its power to deciding whether the law, as construed by the state court, was in violation of any provision of the Federal Constitution.

In *Truax v. Corrigan*, 257 U. S. 312, 66 L. Ed. 254, the question was not whether a provision in a statute was a *condition* but it was as to whether, *whatever it was*, it was valid. It may also be remarked that the decision was dissented from by Mr. Justice Holmes, Mr. Justice Pitney, Mr. Justice Clarke and Mr. Justice Brandeis.

We do not now dispute, and never have disputed, the soundness of the proposition that this court is authorized and required to exercise the power of deciding what the effect of a statute, as construed by a State

court, is, and whether, as so construed, it is valid. But we dispute the power of this court to disregard any construction a state court has placed upon a statute of a state. It was not disputed in either of the cases cited by the court in the instant case.

SECOND. *The court in its previous decisions has held that requirements imposed upon foreign insurance companies are conditions.*

In *Horn Silver Mining Co. v. New York*, 143 U. S. 305, 36 L. Ed. 164, the court, in dealing with the right of a state in the granting of a franchise to a domestic corporation said:

"It (i. e., the state) may impose as a *condition* of the *grant* as well as also of its *continued existence* the payment of a specific sum to the state each year, *or a portion of the profits or gross receipts of the corporation*, and may prescribe such mode in which the sum shall be ascertained as *may* be deemed convenient and just. There is no constitutional inhibition against the legislature *adopting any mode to arrive at the sum which it will exact as a condition of the creation of the corporation or of its continued existence.*"

And, in dealing with the claim of the counsel for the company that the tax was not a license tax, but was one imposed for revenue under the tax laws, the court further said:

"However it (i. e., the tax law) may be regarded, it is the *condition* upon which a foreign corporation can do business in the state, and in doing such business it puts itself under the law of the state, however, that may be characterized."

That decision, until the determination of the instant case, had never been overruled so far as its application to foreign corporations not engaged in interstate commerce and not instrumentalities of the United

States government is concerned, and, had never, up to the time of the instant decision, been modified. Many state laws have been enacted in reliance upon it—laws which cannot stand if the decision in the instant case is adhered to.

In *Fire Association v. New York*, 119 U. S. 10, 30 L. Ed. 343, as we have seen, the court sustained a so-called reciprocal or retaliatory statute of New York. The taxes, fines, penalties, etc., specified in the statute were not taxes, fines, penalties, etc., imposed as *conditions precedent*, but they were required to be imposed after the companies were admitted into the State.

Similar reciprocal or retaliatory statutes are in force in 38 states of the Union and have been in force for many years. As we shall point out hereafter, not one of those statutes can be sustained if the decision in the instant case and the reasoning which supports it are sound.

In *Palmetto Fire Ins. Co. v. Conn*, and five other similar cases the court, on October 25, 1926, affirmed the decisions of the Circuit Courts of Appeals and held that the Chrysler plan, whereby all Chrysler automobiles were insured for one year from the date of sale to the retailer through a contract made in Michigan by the Chrysler Company and the Palmetto Fire Insurance Company, caused contracts for insurance to be made within the state of retail sale, and that such insurance was subject to tax by the State, and that the State could revoke the license of the insurance company on the ground that it had violated the statutes of the several states forbidding the insurance of property in the State except by a legally authorized agent resident in the State and which taxed the business lawfully done there. Thus the court recognized the lawful right of the State to tax the business of a foreign insurance company lawfully done there and to forbid the insurance of property in the

State except by a legally authorized agent resident in the State. In the *Conn case* it sustained the laws of Ohio and in the other cases it sustained similar laws of other states.

The laws of Ohio which the court held good contained the following provisions in addition to the one mentioned in this court's opinion:

First. That every foreign insurance company in its annual statement to the superintendent of insurance should set forth the gross amount of premiums received by it from policies covering risks within that state.

Second. That the Superintendent of Insurance should compute an amount of two and one-half per cent on the balance of such gross amount after making certain deductions as a tax upon the business done by the company in that state for the period shown by the annual statement, and that the company should pay the amount of the tax to the Superintendent of Insurance.

Third. That if the company failed or refused to pay the tax the Superintendent might revoke the company's license to do business in that state.

See Sections 5432, 5433, 5434, 5435, 5436 and 5438 of the General Code of Ohio, Appendix *post* p. 105.

These statutory provisions thus sustained by this court in the *Conn case*, though differing in form from the statutory provisions in force in Illinois, do not differ from those provisions in any particular which can have any effect in the determination of the question whether the Illinois provisions are valid. If the Ohio provisions are valid the Illinois provisions must likewise be valid.

Of the decisions of the Circuit Court of Appeals which this court affirmed on October 25, 1926, two are reported as follows:

Palmetto Fire Ins. Co. v. Conn. 9 Fed. (2) 202.
Chrysler Sales Corporation v. Spencer, 9 Fed.
 (2) 674.

In *Palmetto Fire Ins. Co. v. Conn.*, 9 Fed. (2) 202, in commenting upon the statute which this court then held valid, and the violation thereof by the Insurance Company, the Circuit Court of Appeals, among other things, said that,

“It is a violation of the law of Ohio which fixes the terms and conditions upon which the plaintiff may do business in Ohio.”

and that,

“It (i. e. the company) may not accept the benefits of the right and privilege of doing an insurance business in Ohio and reject the conditions imposed by the statute.”

In *Chrysler Sales Corporation v. Spencer*, 9 Fed. (2) 674, the court upheld the statute and cited with approval *Hooper v. California*, 155 U. S. 648, 39 L. Ed. 297, where the court held that if a state allowed foreign companies to enter the state it had power to determine the conditions under which the entry was to be made and to regulate and enforce all legislation in regard to things done within the territory of the State which might be directly or indirectly requisite in order to render the enforcement of the conceded power efficacious, subject always to the paramount authority of the Constitution of the United States.

The condition involved in these last mentioned cases was not a condition *precedent*. Compliance with it was not necessary to enable the insurance company to get into the State, but it was a condition subsequent to be complied with after it got in to enable it to remain in, and this court held that for non-compliance with it the company's license could be revoked.

Furthermore, it is to be noted that compliance with the condition was required for the sole purpose of enabling the State of Ohio to ascertain the insurance company's gross receipts from Ohio business and compute thereon a two and one-half per cent gross receipts tax, and necessarily the decision of this court was an affirmance of the validity of the law imposing that tax, a tax which was imposed, not as condition *precedent* to the company's *admission into the state*, but as a condition *subsequent* which it must comply with *after it got in* to compensate the state for allowing it to come in and transact business.

THIRD. *If there were no decisions on the subject, compliance with Section 30 of the Act of 1869 would be held to be a condition.*

Is it not self evident that any requirement imposed upon a domestic insurance company in the law under which it is organized, or upon a foreign insurance company in the Act which provides for its admission into the State, is one of the terms or conditions under which it is permitted to transact business in the State? And would not this be true even if there were no provision in the law declaring that it should not continue to transact business if it did not meet the requirement? In the case of a lease, or in the case of any other contract, the provisions defining what the respective parties must do are "terms and conditions" imposed upon them with which they are required to comply.

But here we have an express provision in Section 22 of the Act that to the issuance by the proper officer of the license or certificate of authority to transact business it is necessary that it appear that the company has complied with all the requisitions, i. e., requirements, of the Act. What more is necessary to make compliance with Section 30 a condition which must be complied with to enable the foreign insurance com-

pany, to carry on its business? Is not compliance with that section a requirement?

FOURTH. *Whether compensation exacted from a foreign corporation for the privilege of doing business in the State takes the form of a license tax or a tax imposed for the purpose of securing contributions to the revenue of the State as they are made by other taxpayers of the State cannot reasonably have any bearing upon the question whether the tax is imposed in violation of the Fourteenth Amendment.*

All taxes, whether they are license taxes or property taxes, are imposed for the purpose of securing contributions to the revenue of the state, or its municipal corporations. Why draw a distinction between different forms of taxes? What difference does it make to the taxpayer what his contribution is called?

Is the validity of a tax to depend upon the name given to it, the officer to whom it is payable, or the time of payment?

FIFTH. *The court erroneously assumes that a tax burden imposed for the purpose of securing contributions to the revenues of the state as they are made by other taxpayers of the state cannot be a part of the conditions upon which admission to do business in the state is permitted.*

As we have already pointed out, a tax on net receipts is not such a contribution as is made by other taxpayers. Other taxpayers are not taxed upon their receipts, whether gross or net. Furthermore, net receipts are not property within the meaning of the property tax provisions of the Constitution and laws of Illinois.

Again let us not overlook the fact that no state can tax property which is not within its jurisdiction, either actually or constructively, on the date when the property is assessed. Any law allowing it to tax property beyond its jurisdiction would be unconstitutional.

So while the tax in question is a burden imposed for the purpose of securing contributions to the revenues of the state it is not the kind of a tax that is imposed upon other taxpayers. The reason is that the foreign insurance company escapes payment of the kind of taxes which are imposed upon domestic insurance companies and consequently, if foreign insurance companies are taxed at all, it must be in some other way than that used for taxing domestic companies.

The tax on the net receipts of these foreign companies may be treated as a franchise tax or as compensation for the kind of taxes they escape payment of but which domestic companies cannot escape payment of.

SIXTH. *The claim that, if payment of the tax provided for by Section 30 of the Act of 1869 is made a condition precedent, it is invalid because the tax is unconstitutionally imposed, is inconsistent with the previous declaration (Opinion, p. 8) that "with respect to the admission fee, so to speak . . . the measure of the burden is in the discretion of the State."*

If the "measure" of the admission fee is within the discretion of the State why is not the formula to be used in ascertaining the amount likewise within the State's discretion? It does not seem to be disputed that a law which prescribes that the admission fee for a new year shall be ascertained by computing upon the gross receipts of the preceding year a certain per cent, such as two per cent, two and one-half per cent or three per cent, is valid.

Why, then, cannot a state be permitted to prescribe that the admission fee for the new year shall be ascertained by applying to the net receipts of the preceding year the property tax rate for such past year. Is not that exactly what Sections 22 and 30 of the Act of 1869 have done?

Does not Section 30, as construed by the Supreme Court of Illinois, say that the net receipts shall be re-

ported and there shall be computed thereon a tax equal to the property tax rate? And does not Section 22, as construed by the Supreme Court of Illinois, say to the insurance company that it cannot get a new certificate of authority until it has paid that tax?

Perhaps it may be said that there is an admission fee fixed by the Act of 1919 and that there cannot be two admission fees charged. But why not?

X.

The Decision of the Court of Errors and Appeals of New Jersey in *Erie Railroad Co. v. State*, 31 N. J. L. 531, 542-544, Should Not Be Adopted as Stating the Rules of Law Applicable to Foreign Insurance Companies.

In the opinion in the instant case (p. 12) the court says that its conclusion that tax laws made to apply after a foreign insurance company has complied with the valid conditions precedent and has been received in the State "are to be considered laws enacted for the purpose of raising revenue for the State and must conform to the equal protection clause of the Fourteenth Amendment" "is sustained by the reasoning in a satisfactory judgment of the Court of Errors and Appeals of New Jersey in *Erie Railway Company v. State*, 31 N. J. L. 531, 542, 543, 544."

In that case the law in question required all corporations doing business in that state and not being corporations of that state to be taxed as follows:

"Every such company so doing business shall pay a transit duty of three cents on every passenger, and two cents on every ton of goods, wares and merchandise or other articles, carried or transported by or for such company on any railroad or canal in the state, for any distance

exceeding ten miles, except passengers and freight transported exclusively within this state."

The only question presented was whether the tax was in violation of the commerce clause of the Federal Constitution. Of course to that question but one answer could be given. There was no occasion for a long discussion by the court or any expression of opinion as to questions not presented. In fact, as the decision was rendered in 1864, several years before the adoption of the Fourteenth Amendment, that portion of our fundamental law was not open to consideration.

The court in that case was not dealing with the question whether a state and a foreign insurance company, in advance of the admission of the company into the state, could enter into a binding agreement as to what the company should pay for the privilege of entering into the state before it entered and how it should be taxed after it entered. On the contrary it was dealing with a case of a law to which the railway company had never agreed. It seemed to be very much excited over the prospect that the government could, if it saw fit, seize and confiscate all of the railway company's property on the ground that "incorporated companies have no rights which the law is bound to respect or which are recognized by the Constitution of the United States." The following are fair specimens of the language used by the court:

"The right to tax for revenue is the right of the government to take so much of the property of the person or the company upon which the tax falls as such government may deem necessary for its public wants. The act of taking the property, therefore, must of necessity be an acknowledgment of the legal status of the person or company, whose property is taken. *To assert that*

*a company whose property is thus taken has no rights but such as the government taking it chooses to confer is to assert that such company has no title to its property but such as may be conceded to it by the taking power. * * * It is readily to be conceded that a law imposing certain terms upon all foreign corporations as conditions precedent to this acquisition in this state of the right to act in the unity of their corporate existence would be legal. Such law would prevent foreign persons from doing any legal act in this state as a corporation, but can it be maintained that such law would have the further effect of leaving the property of the company as the spoil of the first taker?"*

Is any such situation as that presented in the instant case? Is the State of Illinois seeking to confiscate the property of the foreign insurance companies? Is the state attempting to do anything more than it notified the insurance companies it would do if they came in and what the insurance companies were content to agree they should do? Could it do any more than that even if it had the disposition to do so?

We submit most respectfully that this court should not, by adoption, use, in support of its decision, the kind of argument thus indulged in by the New Jersey court.

XI.

The Decision of the Case Should Not Be Affected By Any Appresension That Hardship Would Result to the Insurance Companies if the Law Were Sustained.

Counsel for the plaintiff in error in their arguments of this case sought to impress upon the court that if the law in question were sustained the foreign insurance companies would be compelled to pay a large

amount of back taxes and that this would operate as an injustice. There can, however, be no injustice to a taxpayer in compelling him to pay back taxes which the law required him to pay but which he neglected to pay. On the contrary it would be a great injustice to other taxpayers, who had paid the full amount of their taxes, to absolve him from liability for the payment of the omitted taxes. The law provides for the collection of back taxes and everyone is bound to take notice that he cannot be relieved from liability by any mistake of a public officer as to the law. He is not even protected against loss resulting from relying upon an erroneous decision of a court laying down a rule which the court, in a subsequent decision, repudiates.

The claim is made that the local assessors of personal property for many years placed a construction on Section 30 of the Act of 1869, which, when applied to plaintiff in error in the assessment of 1923, would compel it to pay only 30 per cent of what the decree in this case requires it to pay. While theoretically this claim might be entitled to some consideration by the Supreme Court of Illinois with respect to its bearing upon the proper construction of the Act, that court, knowing the capacity of the local assessors, ignored their construction of the act and ignored it properly, and, of course, this court has no power to give it consideration.

We deny that any hardship will result to the foreign insurance companies from the sustaining of the law in question. The Supreme Court of Illinois, it is to be presumed, will accord the insurance companies all their rights and, if that is not done, this court can be again appealed to.

XII.

The Construction to Be Given to the Equal Protection

Clause of the Fourteenth Amendment Should Be a Practical One.

The Fourteenth Amendment must be given effect by state legislatures. The framing of tax laws is a task of more than ordinary difficulty. The opinion of this court does not furnish a safe and reliable guide to a state legislature for the enactment of a law taxing foreign insurance companies, or to a state court for the determination of the validity of the law after it has been enacted. This should not be so. When this court overturns a state law, in whole or in part, it is not too much, we submit, to ask of the court that its opinion should be such that the state legislature and the state court may know what kind of a law will be valid and what kind invalid. We think we are justified in saying that the opinion in the instant case is not such an opinion.

The interpretation of the Fourteenth Amendment in its application to tax legislation will be troublesome enough if it is limited to tax laws imposing taxes *in invitum* without extending its application to cases of taxes imposed with the consent of the taxpayer, unless, of course, that consent has been obtained by fraud. Furthermore a sound public policy will not be subserved by allowing foreign corporations to repudiate their agreements with a state. To permit such repudiation would be to encourage dishonesty. It will necessarily be demoralizing to announce to the public that while individuals are bound by their contracts to pay money foreign corporations are not bound to keep their agreements when they deal with the state.

Again, when the court of last resort, in construing the Fourteenth Amendment, has time and again used plain and unambiguous language announcing the powers of the states with respect to the taxation of foreign corporations and the states have passed laws author-

ized by that language and have kept them in force for years, the circumstances that the court, as subsequently constituted, disapproves of such language should not be permitted to have the result of overturning those laws. Especially is this true where, as here, the tax in question has been agreed to by the party now complaining of it. Plaintiff in error did agree to pay the tax *for the year now in question* commencing May 1, 1922, for it entered the state for *that year* with notice of the decision of the court in the *Kent Case* which was made in December, 1921.

XIII.

The Decision in the Instant Case if Adhered to Will Render Invalid the Laws of Many States Taxing Foreign Insurance Companies.

Of course, if the law in question is clearly in violation of the equal protection of the laws clause of the Fourteenth Amendment, it must be overthrown no matter how many other state laws go with it. *Fiat justitia ruat coelum*. But the authorities of many other states have thought it proper that a state should exercise the power of passing laws for the admission of foreign insurance companies by providing in those laws for the payment by such companies of taxes after their admission different from the taxes imposed upon domestic companies. The validity of those laws has rarely, if ever, been questioned and none of them has been heretofore successfully assailed. The validity of the Illinois law was never questioned for fifty years, and then only because of the construction put upon it by the Supreme Court of that State. These are circumstances which, we respectfully submit, should induce the court to make sure it is right in the views expressed in the opinion in the instant case before the decision is made final.

We will therefore call attention to the laws of a few of the states which are fair illustrations of the different methods adopted in the taxation of foreign insurance companies.

RECIPROCAL OR RETALIATORY STATUTES

We have already called attention to the retaliatory statute of New York which was sustained in *Fire Association v. New York*, 119 U. S. 110, 30 L. Ed. 342, and pointed out that similar statutes are in force in 38 states of the Union. That statute provided that when other states imposed upon New York companies higher taxes, penalties, etc., than New York imposed upon their companies, those higher taxes should be imposed upon such foreign companies by the taxing authorities of New York.

If the opinion in the instant case is adhered to all these retaliatory statutes must be held to be invalid.

FIRE DEPARTMENT TAX

A considerable number of states have statutes imposing upon foreign fire insurance companies a tax computed upon their gross receipts from fire insurance for the benefit of fire departments in cities. The Illinois statute (see Appendix to Brief for Defendant in Error, pp. 90-92) is a fair sample of this kind of legislation.

This tax is not payable as a condition *precedent* upon which the foreign insurance company can enter the state and transact business but it is made payable after the company has entered the states and transacted business.

If, now, it is true that the privilege tax provided for by the Act of 1919 is the "admission fee" and that "after its admission the foreign corporation stands

equal and is to be classified with domestic corporations of the same kind" (Opinion p. 8), how can such a law be sustained when this fire department tax is not imposed upon domestic corporations also?

NEW YORK

The laws of New York (Appendix, *post* 100) contain, among others, the following provisions applicable to foreign insurance corporations:

1. "The capital of an insurance corporation incorporated under the laws of any state or country outside of the United States, to the extent employed in the transaction of business in this State . . . shall be subject to taxation the same as the capital of a like domestic insurance corporation.

2. "Every health or casualty insurance corporation incorporated by or organized under the laws of any government outside of the United States . . . shall, for the privilege of doing business in this State, and in addition to any other taxes imposed for such privilege, annually, on or before the first day of April, pay to the Superintendent of Insurance a tax of two per centum on all premiums received . . . in this State during the year ending on the preceding thirty-first day of December, for business done at any time in this State on risks resident therein."

But health or casualty companies organized under the laws of other States of the Union are taxed only *one* per cent on their gross receipts.

Does not the equal protection clause of the Fourteenth Amendment apply to corporations organized under the laws of other countries?

3. "Every other foreign insurance corporation . . . authorized to transact in this State any of the kinds of insurance specified in Sections 110

or 150 of this chapter, shall, for the privilege of doing business in this State, and in addition to any other taxes imposed for such privilege, annually, on or before the first day of April, pay to the Superintendent of Insurance a tax of two per centum . . . upon the amount of all premiums, including reinsurance premiums, upon such insurances . . . which have been received . . . for any such insurance effected, or procured within this State for the year ending the preceding thirty-first day of December."

NEW JERSEY

The laws of New Jersey (Appendix, *post* p. 102) contain the following provisions:

"Every insurance company . . . of any other state or foreign company . . . shall, on or before the fifteenth day of February of each year, make to the Commissioner of banking and Insurance a report . . . stating the gross amount of premiums and premium deposits and assessments received by such company . . . on business of said company in this State for the preceding year and shall pay to said Commissioner, on or before the 15th day of February, a tax of two per centum upon such gross amount of premiums, premium deposits and assessments received . . . which tax shall be in lieu of all other *franchise* taxes imposed upon said corporation."

The tax thus provided for is not called a *privilege* tax, but is given the name of a *franchise* tax. It is computed on the receipts of the preceding year and is not declared to be either a condition *precedent* or a condition *subsequent* imposed upon the company for the privilege of doing business in the State. It assumes that the company has been admitted into the State.

No such tax is imposed upon domestic companies and the foreign company, if it has any property within

the State, is not relieved from the payment of the taxes which other taxpayers are required to pay.

If the decision of this court in the instant case is sound such a law must be declared invalid because, after a foreign corporation has been admitted into the state, it is subjected to greater taxation *for the purpose of raising revenue for the state* than a domestic corporation of the same kind is subjected to. The State of New Jersey might have imposed this tax as *an admission fee*, but it could not lawfully impose it subsequent to admission as a *franchise tax*.

OHIO

In the Appendix to our petition (*post* p. 105) we have set forth sections 5432, 5433, 5434, 5436 and 5438 of the General Code of Ohio. The provisions of these sections were sustained as valid by this court in *Palmetto Fire Insurance Company v. Conn.* October 25, 1926. The insurance company was held to have violated Section 5438 by writing policies of insurance in Michigan on property in Ohio. For this the court held the State of Ohio was authorized to revoke the company's license. While the decision related directly only to Section 5438, yet, as that section was framed to make practicable the enforcement of the other sections, the decision was necessarily an affirmation of the validity of the entire act. Section 5438 did not apply to domestic companies. Nevertheless the court held it valid as against foreign companies although it prescribed a condition to be performed *after the foreign insurance company was admitted into the State*.

Section 5433 imposes a gross receipts tax of two and one-half per cent upon a foreign insurance company. This tax is not called a privilege tax. Its payment is not made a *condition precedent* to the issuance of a license. It is computed upon the gross re-

ceipts of the preceding year and is declared to be a business tax for *that year*. Non-payment is cause for revocation.

No gross receipts tax is imposed upon an Ohio company and a foreign company if it happens to have any property in Ohio subject to taxation, is not relieved from the payment of the property tax which a domestic company pays.

How can such a tax be sustained if it is the law, as this court now says it is, that when a state once admits a foreign insurance company it cannot thereafter impose upon it taxes greater than those imposed upon a domestic company, even if the imposition of the tax is provided for in the law by which the company secures admission?

Is there a real and substantial difference, so far as its validity is concerned, between a statute imposing a two and one-half per cent *gross* receipts tax and one imposing a *net* receipts tax using the property tax rate for computing the amount?

MICHIGAN

The laws of Michigan (Appendix, *post* p. 107) contain, among others, the following provisions:

“Every foreign insurance company * * * admitted to do and doing any business in this State, shall, as a condition precedent to the privilege of doing such business, pay to the treasurer of the State of Michigan, on the first day of January of each year, or within sixty days thereafter * * * a tax upon its said business within this State * * * for the year ending December thirty-first of the preceding year as follows: * * *

“Third. Fire, marine and automobile insurance companies, whether stock or mutual, three per centum on all premiums, deducting for returned premiums on cancelled policies and insur-

ance when the tax has been paid on the original insurance and in mutuals also deducting for dividends paid to members."

"Such specific taxes shall be in lieu of all other taxation, whether state or local, excepting for real estate owned by such companies within this State and securities deposited therein unless exempted under the general tax law of the State."

In this instance the law names the tax a privilege tax and says it is a condition *precedent*, but it is computed upon past receipts. It applies to companies *admitted to do business*, which implies that, while the tax is called a condition *precedent*, it is payable at the end of the year after the foreign company has been admitted. This view of the effect of the statute is shown to be correct by the circumstance that the gross receipts tax is declared to be "in lieu of all other taxation," because property taxes are never paid in advance, but at the end of the tax year.

The forms of the Illinois statute of 1869 and the Michigan statute are different in the method employed in computing and ascertaining the amount of the tax. They are the same in this particular, that *delinquency in the payment of the tax prohibits the issuance of the certificate of authority to transact business*.

IOWA

The laws of Iowa (Appendix, *post* p. 108) impose a gross receipts tax of two and one-half per cent of the receipts for the preceding year—as shown by the foreign insurance company's annual statement for that year and it is made payable *at the time such annual statement is made*, and the company cannot get its certificate of authority for a new year until the tax is paid. The payment of the tax for the *preceding* year is thus made a condition *precedent* to the issuance of the certificate of authority for the *succeeding* year

just as Section 22 of the Act of 1869 makes compliance with Section 30 a condition precedent to the issuance of the certificate of authority for the succeeding year.

The forms of the Illinois statute and that of the Iowa statute are different from each other, but they are not substantially different in their practical operation.

NEBRASKA

The Nebraska Revenue Act, as we have already seen (*ante* pp. 40, 57), requires the assessment and taxation of *gross* receipts and provides that "such *gross* receipts to be taken as an item of property of that value and to be *assessed and taxed on the same percentage of such value as other property*," while the Illinois statute, as construed by the Illinois Supreme Court, requires the taxation of *net* receipts and provides that the property tax rate shall be extended *upon the full amount of the net receipts*. The Supreme Court of Nebraska in *State v. Fleming*, 70 Neb. 529, 97 N. W. 1063, held that this tax was a privilege tax and not a property tax and that it was not a substitute for property taxes.

OREGON

The state imposes a gross premiums tax of two and one-half per cent on foreign insurance companies. (See Appendix, *post* p. 109). It is not an admission fee, but is payable at the end of the year. It does not relieve the companies from the payment of property taxes.

Domestic companies pay no gross receipts tax.

MISSOURI

In this state foreign insurance companies pay a two per cent gross premiums tax. (See Appendix,

post p. 110). This is in lieu of all other taxes except as otherwise provided. In *Massachusetts Bonding and Insurance Co. v. Chorn*, 201 S. W. 1122, the Supreme Court of Missouri held that a tax on premiums was not a property tax. In *St. Joseph v. Insurance Co.* 183 Mo. 1, 81 S. W. 1080, it held the law imposing it did not repeal laws authorizing cities to levy a license or occupation tax; and in *Richmond v. Creel*, 253 Mo. 256, 161 S. W. 794, it held that a license tax and a tax on net income were not duplicate taxation.

This gross receipts tax is payable at the end of the year. Its payment is not a condition *precedent*, but a condition *subsequent*.

The foregoing are fair examples of the foreign insurance company tax laws of the different states.

Whatever differences may exist in the forms of those statutes it is plain that in substance they agree in the following particulars:

1. The tax imposed is one imposed for general revenue purposes and it goes into the treasuries of the states and their municipal corporations to be used to pay the expenses of maintaining the state and municipal governments. No distinction is made between different forms of taxes.

2. Taxes on receipts, whether gross or net, of foreign insurance companies are computed on past receipts and payment of such taxes are not made conditions precedent to the entry of the foreign insurance companies into the state, but are made conditions precedent to their continuance in business in the state.

XIV.

The Rule That a Statute Must Be Held Constitutional If It Can Be By Any Practicable and Reasonable Method of Construction Requires That Section 30 of the Act of 1869 Should Be Sustained.

What will be the result, as far as the State of Illinois is concerned, of a decision nullifying the statute in question? Of course it will relieve all foreign insurance companies in Illinois from tax liability. They can carry on business in the State without having any property within its jurisdiction and consequently cannot be compelled to pay any property taxes if the law in question is wiped out. The result will be that domestic insurance companies and all taxpayers other than foreign insurance companies will be the victims of unjust discrimination and will be denied the equal protection of the laws. Surely the Fourteenth Amendment does not contemplate any such result.

But it may be urged that the State of Illinois can pass a new law providing for the taxation of such companies in a manner that will not conflict with the Fourteenth Amendment. Even assuming that to be true, such a law cannot apply to the past three years for which foreign insurance companies have refused to pay any tax or to previous years during which many companies did not report their receipts and did not pay any net receipts tax even upon a debased and equalized valuation.

There would be no strain on the rules of sound reasoning resulting from sustaining the law. It can only be held invalid by repudiating the prior declaration of this court in *Maine v. Grand Trunk R. Co.*, 142 U. S. 217, 35 L. Ed. 994, that

“The character of the tax, or its validity, is not determined by *the mode adopted in fixing the amount*—for any specific period or the times of its payment.”

its declaration in *Home Insurance Company v. New York*, 134 U. S. 594, 33 L. Ed. 1025, that

“No constitutional objection lies in the way of a legislative body *prescribing any mode of measurement to determine the amount it will charge for the privilege it bestows.*”

and similar declarations in other cases.

On the other hand, the court, to overthrow the law has been compelled to lay down the proposition never before laid down by any court, and which the court has repudiated when it was attempted to be applied to domestic corporations, that an agreement *made before a privilege is granted* to pay money *after the privilege has been obtained*, or an agreement to fix the amount of the payment by the use of the property tax rate, is not valid. Practically the court has said to the State of Illinois "*You must get your pay in advance or you can't get it at all.*" In what provision of the Constitution of the United States is there to be found any grant to this court to exercise a power of this character?

XV.

CONCLUSION

We respectfully submit that the following propositions, among others, are sound and that their application to the instant case requires the affirmance of the decree of the Supreme Court of Illinois:

FIRST. A foreign fire insurance company can only secure admission into the State of Illinois by complying, or agreeing to comply, with such conditions as to money payments as are specified in the Act of 1869, and that its acceptance of the certificate of authority or license constitutes an implied agreement to perform such conditions.

SECOND. Anything which a law admitting a foreign insurance company specifies that it must do, either before or after its admission, is a condition of admission,

THIRD. While there are some conditions which are unlawful and cannot be enforced one which requires the insurance company to pay money, either before or after its admission, is not one of them.

FOURTH. A condition for the payment of money being lawful any method of computing the amount or provision as to the time of payment or as to the person to whom the payment is to be made is also lawful.

FIFTH. Even if the imposition of the tax provided for by Section 30 of the Act of 1869 were otherwise unconstitutional, the foreign insurance company by accepting the privileges conferred by the Act of 1869 impliedly agreed to pay it and is estopped from alleging its unconstitutionality as a ground for being relieved from its payment.

SIXTH. Even if the foreign insurance company could be permitted to repudiate the tax if it were unconstitutional notwithstanding its agreement to pay it, the tax would have to be sustained as one the state had a right to impose because of the difference between the situation of the foreign insurance company and the domestic insurance company, in this, that under the tax laws of the state the domestic company must pay a property tax while the foreign company cannot be compelled to pay such a tax.

SEVENTH. If unjust discrimination against the foreign insurance company were a good ground for nullifying the tax the burden of proof would be on the foreign insurance company to establish such discrimination by affirmative proof and there being no proof in the record upon which the court can base a finding of unjust discrimination, the foreign insurance company's case must fail.

We respectfully submit that a rehearing should be allowed in this case and a reargument ordered.

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The undersigned, of counsel for the defendant in error, hereby certifies that the foregoing petition for a rehearing is presented in good faith and not for delay.

HIRAM T. GILBERT.

APPENDIX

Many of the laws required to be considered by the court are set forth in the Appendix to the Brief for Plaintiff in Error, pp. 81-102, and in the Appendix to the Brief for Defendant in Error, pp. 75-103, and for that reason it is not deemed necessary to inset them in this Appendix.

I.

LAWS OF ILLINOIS

Sections 22, 23 and 24 of Chapter LXIV of the Revised Statutes of Illinois of 1845 are as follows:

“Sec. 22. All agents of foreign insurance companies shall, upon their acceptance of such agencies, signify the same in writing, to the clerk of the county commissioners’ court of their respective counties, which notice shall be filed by the clerk in his office, which shall entitle the agent to grant policies of insurance, according to the laws governing the company of such agency.

“Sec. 23. The said agent or agents shall be required to pay over to the clerk of the county commissioners’ court, three per cent on the amount of premiums charged by him on all policies by him issued; and the said clerk shall give to the agent, duplicate receipts, one of which the clerk shall retain; and the said clerk shall enter the amount so received in a book kept by him for that purpose, designating the time when and

from what agent the same was received; and the said clerk shall, on the first day of January and the first day of July annually, (if he has in his hands any funds so received) make out an abstract of the same, and shall forward said abstract, together with the money on hand, to the treasurer of the State of Illinois, who shall receive the same and enter the amount so received in a book kept by him for that purpose, with the time when and from what clerk and county the same was received; and the moneys so received shall be considered as revenue to the State, and by the treasurer paid out as such.

“Sec. 24. Any agent failing to pay over to the clerk of the county commissioners’ court, the per cent as directed in this chapter, shall subject himself to be fined double the amount of the premium upon which he failed to pay over the per cent as directed in this chapter; one-half to the informer, and the other half to be paid over to the clerk of the county commissioners’ court, and paid over by him to the State treasurer, in like manner as the per cent in this chapter is directed to be paid.”

II.

LAWS OF NEW YORK

The laws of New York in addition to provisions for filing papers, for copies of papers, etc., provisions for the issuance of certificates of authority, reciprocal or retaliatory provisions and provisions for fire department taxes, which, in substantially the same form, are found in foreign insurance company tax laws of other states, contain the following:

“Par 34. *TAXATION OF FOREIGN CORPORATIONS AND FOREIGN INSURERS.* The capital of an insurance corporation incorporated under the laws of any state or country outside of the United States

to the extent employed in the transaction of business in this state, and as determined and certified as prescribed by Section 27 of this chapter, shall be subject to taxation the same as the capital of a like domestic insurance corporation, to be levied, assessed and collected as prescribed by law, at such place in the state as it shall have its principal office. Every health or casualty insurance corporation incorporated by or organized under the laws of any government outside of the United States engaged in the transaction of the business of health or casualty insurance in this state under a certificate of authority from the superintendent of insurance shall, for the privilege of doing business in this state and in addition to any other taxes imposed for such privilege, annually, on or before the first day of April, pay to the superintendent of insurance a tax of two per centum on all premiums received in cash or otherwise by its attorneys or agents in this state during the year ending on the preceding thirty-first day of December, for business done at any time in this state on risks resident therein. Every life insurance corporation incorporated by or organized under the laws of any government outside of the United States engaged in the transaction of the business of life insurance in this state under a certificate of authority from the superintendent of insurance shall, for the privilege of doing business in this state, and in addition to any other taxes imposed for such privilege, annually, on or before the first day of April, pay to the superintendent of insurance, a tax of one per centum on all premiums received in cash or otherwise by its attorneys or agents in this state during the year ending on the preceding thirty-first day of December, for business done at any time in this state on risks resident therein.

“Every other foreign insurance corporation or foreign insurer authorized to transact in this state any

of the kinds of insurance specified in Sections 110 or 150 of this chapter shall, for the privilege of doing business in this state and in addition to any other taxes imposed for such privilege, annually, on or before the first day of April, pay to the superintendent of insurance a tax of two per centum (or in case of a health or casualty insurance corporation incorporated under the laws of any other state of the United States, a tax of one per centum) upon the amount of all premiums, including reinsurance premiums, upon such insurances (except premiums for insurances and reinsurances on property or risks, other than automobiles, against loss or damage by fire and lightning) which have been received by, or agreed to be paid to, any such foreign insurance corporation or foreign insurer or any attorney or agent thereof, for any such insurance effected, or agreed to be effected, or procured within this state for the year ending on the preceding thirty-first day of December, provided that in the case of insurances, other than marine and inland navigation and transportation insurances, the tax shall be computed only upon the amount of all premiums received by or agreed to be paid to such foreign insurance corporations or foreign insurer or any attorney or agent thereof for insurances and reinsurances upon property or risks located or resident in this state." (Cahill's Consolidated Laws of New York, 1923, Chapter 30, Art. 3, page 1062).

III.

LAWS OF NEW JERSEY

The following are the provisions of the Laws of New Jersey for the taxation of foreign insurance companies as set forth in the 1911-1924 Cumulative Supplement to the Compiled Statutes of New Jersey, Vol. 1, Page 1853:

"Par. 99-65. ANNUAL REPORT OF FOREIGN COMPANIES — CONTENTS — PREMIUM TAX.

Every insurance company, other than life, of any other State or foreign country, transacting business in this State, shall, on or before the fifteenth day of February of each year, make to the Commissioner of Banking and Insurance a report, signed and sworn to by an officer of the company, or by its United States manager, if a company of a foreign country, stating the gross amount of premiums and premium deposits and assessments received by such company, and by each agent thereof, on business of the said company in this State for the preceding calendar year, including all premiums and premium deposits and assessments received from other companies, for reinsurance of them, and the amount of premiums and premium deposits and assessments returned to the insured during said year on policies cancelled, and the amount of premiums and premium deposits and assessments paid for reinsurance in other insurance companies of other States or foreign countries, authorized to do business in this State, and the amount of premiums and premium deposits and assessments and so-called dividends of unused or unabsorbed portion of all premiums and premium deposits and assessments returned or credited to policyholders during the year for which the tax is determined, and shall pay to said Commissioner on or before the 15th day of February a tax of two per centum upon such gross amount of premiums and premium deposits and assessments received, less such returned premiums and premium deposits and assessments and such reinsurance premiums and premium deposits, and assessments paid, and less the premiums and premium deposits and assessments and so-called dividends or unused or unabsorbed portion of all premiums and premium deposits and assessments returned or credited to policyholders during the year for

which the tax is determined, which tax shall be in lieu of all other franchise taxes imposed upon said corporation; provided, any taxes hereafter paid to the treasurer of any firemen's relief association of this State by fire insurance companies of other States and foreign countries and their agents, in accordance with the provisions of an act entitled "An act to facilitate the collection from fire insurance companies not organized under the laws of this State, but doing business herein, and their agents and brokers, of certain premiums for the benevolent funds of the several duly incorporated firemen's relief associations of this State," approved May second, one thousand eight hundred and eighty-five, shall be considered a part of the tax payable by such companies under this section, and nothing herein contained shall be construed to repeal, alter or change the provisions of the said recited act.

"And provided, further, that any taxes hereafter paid to the treasurer of any police pension fund by any foreign insurance company or its agents, in accordance with the provisions of an act entitled "A further supplement to an act entitled 'An act to remove the fire and police departments in the cities of this State from political control,' approved May second, one thousand eight hundred and eighty-five, and to provide for the establishment, management and distribution of a police pension or retirement fund,' approved April 8th, one thousand nine hundred fifteen, shall be considered a part of the tax payable by such company under this section, and nothing herein contained shall be construed to repeal, alter or change the provisions of the said recited act." (L. 1902, p. 433, as amended L. 1903, p. 506, L. 1906, p. 22 (C. S., p. 2857), L. 1916, c. 224, p. 451, L. 1924, c. 208, p. 437)

The New Jersey statutes also contains the usual reciprocal or retaliatory provisions.

LAWS OF OHIO

Sections 5432, 5433, 5434, 5435, 5436 and 5438 of the General Code of Ohio as set forth in Volume 1 of Page's edition are as follows:

"Sec. 5432. *ANNUAL STATEMENTS OF FOREIGN INSURANCE COMPANIES.* Every insurance company incorporated by the authority of another state or government, in its annual statement to the superintendent of insurance, shall set forth the gross amount of premiums received by it from policies covering risks within this state during the preceding calendar year, without deductions for commissions, return premiums, considerations paid for reinsurance or any deductions whatever. It shall also set forth therein in separate items, return premiums paid for cancellations and considerations received from other companies for reinsurances in this state during such year. If the superintendent of insurance has reason to suspect the correctness of such statement he may make an examination, at the expense of the state, of the books of such company or its agents for the purpose of verifying them. (R. S. Sec. 2745).

"Sec. 5433. *PAYMENT OF TAX TO TREASURER OF STATE.* If the superintendent of insurance finds such report to be correct, prior to the month of November in each year, he shall compute an amount of two and one-half per cent of the balance of such gross amount after deducting such return premiums and considerations received for reinsurances as shown by the next preceding annual statement and charge them to such company as a tax upon the business done by it in this state for the period shown by such annual statement, which amount shall be paid by each such company to the treasurer of state in the month of November next succeeding. All taxes so collected shall

be credited to the general revenue fund of the state.

“Sec. 5434. *FAILURE TO PAY TAX OR MAKE TRUE STATEMENT.* If a company fails or refuses to pay such tax, after a statement thereof has been made and mailed to it, or if the statement required to be made by it under Section fifty-four hundred and thirty-two is false or incorrect, the superintendent of insurance may revoke the license of such company doing business in this state. Upon failure or refusal to pay the tax, the superintendent of insurance shall certify that fact to the Attorney General, who shall thereupon begin an action against the company in the court of common pleas of Franklin County, or of any other county, as he may elect, to recover the amount of the tax. If such company ceases to do business in this state, it shall thereupon make report to the superintendent of insurance of the gross amount of premiums, not theretofore reported as provided in Section fifty-four hundred and thirty-two, received by it from policies covering risks within this state, prior to such discontinuance of business after deducting return premiums and considerations received for reinsurance, not theretofore so reported, and shall forthwith pay to the superintendent of insurance a like per cent of tax thereon. (R. S. Sec. 2745)

“Sec. 5436. *RETALIATORY PROVISION.* If the laws of another state, territory or nation authorize charges for the privilege of doing business therein, or taxes against insurance companies organized in this state, exceeding the charges provided in this chapter, like amounts shall be charged against all insurance companies of such state, territory or nation, doing business in this state, instead of the charges herein provided. (R. S. Sec. 2745)”

“Sec. 5438. An insurance company or agent legally authorized to transact insurance business in this State shall not write, place or cause to be written or placed

a policy, renewal of policy or contract for insurance upon property situated or located in this State, except through a legally authorized agent in this State, who shall countersign all policies so issued and enter the payment of the premiums upon his record. The writing, renewal, placing or causing to be written or placed of a policy of insurance in any other manner or form is a violation of the law providing for the payment of taxes by foreign insurance companies doing business in the State of Ohio as set out and provided in this chapter."

V.

LAWS OF MICHIGAN

The provisions of the laws of Michigan for the taxation of foreign insurance companies as set forth in Cahill's Compiled Laws of Michigan Annotated Supplement 1922, Chap. 178, Page 987, are as follows:

"Par. 9100 (82) Sec. 17. *TAXATION OF FOREIGN INSURANCE COMPANIES*. Every foreign insurance company, of the classes herein enumerated, admitted to do and doing any insurance business in this State, shall, as a condition precedent to the privilege of doing such business, pay to the treasurer of the State of Michigan, on the first day of January, of each year, or within sixty days thereafter (subject to the retaliatory provisions hereinbefore provided) a tax upon its said business written in this State under the authority of the Commissioner of Insurance hereof, for the year ending December thirty-first, of the preceding year, computed as follows:

"First, old line legal reserve life insurance companies, whether organized on the stock or mutual plan, a tax of two percentum on the gross premiums;

"Second, mutual workmen's compensation companies, and casualty companies having a capital stock, a tax of two percentum on all premiums, deducting for

premiums returned on cancelled policies, and reinsurance premiums received when the tax has been paid on the original premium;

“Third, fire, marine and automobile insurance companies, whether stock or mutual, three percentum, on all premiums, deducting for returned premiums on cancelled policies and reinsurance when the tax has been paid on the original premiums; and in mutuals also deducting for dividends paid to members.

“Such specific taxes shall be in lieu of all other taxation, whether State or local, excepting for real estate owned by such companies within this State and securities deposited herein unless exempted under the general tax laws of the State. No certificate of authority shall be granted to any insurance company, or to its agents as such, that is delinquent in the payment of the taxes or penalties prescribed in this act.”

The retaliatory provisions referred to in the foregoing section are substantially the same as the retaliatory provisions found in the laws of other states.

VI.

LAWS OF IOWA

The provisions of the laws of Iowa for the taxation of foreign insurance companies as set forth in the Compiled Code of Iowa, 1919, Vol. 1, Title XIV, Ch. 6.

“Sec. 4517. *INSURANCE COMPANIES.* Every insurance company or associated organized or incorporated under the laws of any state or nation other than the United States, and every other insurance company whose charter may be owned or a majority of whose stock may be controlled or whose business shall be carried on in the interest or for the benefit of any insurance company or association incorporated under the laws of any state or nation other than the United States, shall, at the time of making the annual

statements as required by law, pay into the state treasury as taxes two and one-half per cent of the gross amount of premiums received by it or its agents, in cash, promissory obligation or other form of settlement for business done in this state, including all insurance upon property situated in this state and upon the lives of persons resident in this state during the preceding year. Every insurance company incorporated under the laws of any state of the United States other than the State of Iowa, not including associations operating under the provisions of Chapter 4, Title 18 of this code, or fraternal beneficiary associations doing business in the United States, shall, at the time of making the annual statements as required by law, pay into the state treasury as taxes two and one-half per cent of the gross amount of premiums received by it for business done in this state, including all insurance upon property situated in this state and upon the lives of persons resident in this state during the preceding year. At the time of paying said taxes, said companies and associations shall take duplicate receipts therefor, one of which shall be filed with the auditor of state, and upon filing of said receipt, and not till then, the auditor shall issue the annual certificate as provided by law. No deduction or exemption from the taxes herein provided shall be allowed for or on account of any indebtedness owing by any such insurance company or association; provided, however, that companies doing a fire insurance business may deduct from the gross amount of premiums received the amount of premiums returned upon cancelled policies issued upon property situated in this state."

VII.

LAWS OF OREGON

The provisions of the Oregon statutes imposing gross receipts taxes on foreign insurance companies

(Laws of 1917, Ch. 203, Sec. 3d, Par. 6330 of Olson's General Laws of 1920) are as follows:

“(1) Every foreign or alien company in its annual statement to the commissioner shall set forth the gross amounts of premiums received by it from policies covering risks within the state during the preceding calendar year. It shall also set forth therein, in separate items, return premiums paid, payments paid policyholders and considerations paid other companies for re-insurance in the state during such year, including premiums received for reinsurance of risks written by companies not licensed in this state during the preceding calendar year.

“(2) If the commissioner finds such report as filed by alien or foreign insurance company to be correct, he shall compute an amount of two and one-half per cent on the balance of such gross amount of premiums after deducting such return premiums, payments to policyholders for claims and other obligations and considerations paid for reinsurance admitted companies and charge the same to such company as a tax upon the business done by it in the state for the period shown by such annual statement. He shall forthwith mail to the last known address of the principal office of such company a statement of the amount so charged against it, which amount the company shall pay to the commissioner on or before April 1st of each year.”

Domestic fire insurance companies pay no gross receipts tax.

Foreign companies are not relieved from the payment of property tax.

VIII.

LAWS OF MISSOURI

The provisions for the taxation of insurance com-

panies in the statutes of Missouri, as set forth in the Revised Statutes of 1919 are as follows:

"Sec. 6386. The property of all insurance companies organized under the laws of this state shall be subject to taxation for state, county, municipal and state purposes, as provided in the general revenue laws of this state in regard to taxation and assessments of insurance companies. * * *

"Sec. 6387. Every insurance company or association, not organized under the laws of this state, shall, as hereinafter provided, annually pay tax upon the premiums received, whether in cash or in notes, in this state, or on account of business done in this state, for insurance of life, property or interest in this state at a rate of two per cent per annum in lieu of all other taxes, except as in this article otherwise provided, which amount of taxes shall be assessed and collected as hereinafter provided: *Provided*, that fire insurance companies shall be credited with cancelled or returned premiums, actually paid during the year in this state and with premiums on reinsurance with companies authorized and licensed to transact business in Missouri, which insurance shall be reported by the company reinsuring such business; but no credit shall be allowed any fire insurance company for reinsurance in companies not licensed to transact business in Missouri."

A tax on premiums is not a property tax. *Massachusetts Bonding and Ins. Co. vs. Chorn*, 201 S. W. 1122.

This section does not repeal laws authorizing cities to levy a license on occupation tax. *St. Joseph Ins. Co.* 183 Mo. 1; 81 S. W. 1080.

A license tax and a tax on net income are not duplicate taxation. *Richmond v. Creel*, 253 Mo. 256; 161 S. W. 794.

IX.

OPINION OF SUPREME COURT OF ILLINOIS

In *People v. Kent*, 300 Ill. 324, 327, 328, the Supreme Court of Illinois reviewed its previous decisions and pointed out that it had never decided that the method of assessment adopted prior to that time was right. The court (pp. 227-228) said:

"The net receipts for the year are not subject to taxation under the General Revenue Act, which refers only to such property as has a *situs* in the State. The act authorizes the listing and taxation *only of such part of the net receipts as is on hand or in banks in the county on April 1 of each year*, but does not authorize the taxation of net receipts *which may have been absorbed by losses or transmitted to the home office of the company in another state before April 1.* (*Fidelity and Casualty Co. v. Board of Review*, 264 Ill. 11.) Such part of the net receipts is taxable, *not as and because it is net receipts but as and because it is cash on hand.* The effect of the decision is that if Section 30 is given the plain meaning of its language, the tax on annual net receipts is not a property tax but a tax on the business of insurance. The case of *National Fire Ins. Co. v. Hanberg*, 215 Ill. 378, decided only that the 'net receipts,' as used in Section 30, meant gross receipts less operating expenses, and did not authorize the deduction of fire losses. In that case the insurance company filed a bill against the county collector for an injunction against the collection of all tax extended on assessment of its net receipts under Section 30 in question here. It was not possible to determine how the board of review arrived at the amount of the assessment, but as on the complainant's own showing the amount of its net receipts was greater than the amount of the assessment unless it was entitled to

deduct fire losses, the consideration of the case was limited to that one question. The bill was dismissed *but it was not decided that the method of assessment was right*. In the case of *People v. Cosmopolitan Fire Ins. Co.*, 246 Ill. 442, it was stated that 'the net receipts are personal property and are to be listed by the board of assessors and board of review and taxed the same as other property.' This statement referred to the rate of taxation and was in accordance with Section 30, which directed that the net receipts should be entered on the tax lists and subject to the same rate of taxation that other personal property is subject to. *It did not refer to the character of the tax, the manner of its collection or the question of assessment.*"

SUPREME COURT OF THE UNITED STATES.

No. 179.—OCTOBER TERM, 1926.

Hanover Fire Insurance Company,
Plaintiff in Error,

vs.

Patrick J. Carr, County Treasurer
of the County of Cook, State of
Illinois, etc.

In Error to the Supreme
Court of the State of
Illinois.

[November 23, 1926.]

Mr. Chief Justice TAFT delivered the opinion of the Court.

This is a writ of error under section 237 of the Judicial Code to the judgment of the Supreme Court of Illinois, affirming a decree of the Superior Court of Cook County dismissing the bill of the Hanover Fire Insurance Company, a corporation of New York, against Patrick J. Carr, County Treasurer and *ex-officio* tax collector of Cook County, Illinois. The prayer was for an injunction to prevent the distraint of the property of the complainant under a warrant for the collection of \$10,678.50 as taxes due under a law of Illinois, which law, the bill averred, denied to the complainant the equal protection of the laws under the Fourteenth Amendment of the Federal Constitution.

The defendant filed an answer denying the claims of the bill and after a reply the case was heard by the trial court which made findings of fact in its decree based on a stipulation by the parties and entered a decree as set forth below.

The law in question reads as follows:

“Foreign Companies.—Tax on net receipts. Section 30. Every agent of any insurance company, incorporated by the authority of any other State or government, shall return to the proper officer of the county, town or municipality in which the agency is established, in the month of May, annually, the amount of the net receipts of such agency for the preceding year, which shall be entered on the tax lists of the county, town and municipality, and subject to the same rate of taxation, for all purposes—State, county, town and municipal—that other personal property is subject to at the

place where located; said tax to be in lieu of all town and municipal licenses; and all laws and parts of laws inconsistent herewith are hereby repealed: Provided, that the provisions of this section shall not be construed to prohibit cities having an organized fire department from levying a tax, or license fee, not exceeding two per cent in accordance with the provisions of their respective charters, on the gross receipts of such agency, to be applied exclusively to the support of the fire department of such city." Cahill's Ill. Rev. Stat. 1925, ch. 73, section 159, p. 1405.

This had been in force since 1869 and was part of the Act of March 11, of that year, entitled "An Act to incorporate and to govern fire, marine and inland navigation insurance companies doing business in the State of Illinois." The section was amended to the above form by an Act approved May 31, 1879.

By section 22 and other sections of the original Act of 1869 (Cahill's Ill. Rev. Stat. 1925, ch. 73, sec. 150, p. 1402), it was made unlawful for a foreign insurance company to transact any insurance business in the State unless it had a prescribed amount of capital, appointed an attorney in the State on whom process of law could be served, filed a properly certified copy of the charter or deed of settlement of the insurance company, showing its name and the place where located, the amount of its capital and a detailed statement of its assets, together with its indebtedness, the losses adjusted and unpaid, the amount incurred and in process of adjustment, and a copy of its last annual report. It was required also to deposit with the Director of Trade and Commerce of the State, for the benefit and security of the policy holders residing in the United States, a sum of not less than \$200,000 in 6 per centum stock of the United States or the State of Illinois, or approved mortgage securities, with a provision that so long as the company should continue solvent and comply with the laws of the State, it might collect the interest on these securities. The law provided that it should not be lawful for the agents of the company to transact business without procuring annually from the Director of Trade and Commerce the authority stating that such company had complied with all the requisitions of the act which applied to it, and that any violation of the provisions of the act should subject the one violating it to a penalty not exceeding \$500 for each violation; that such insurance companies should make annual statements of their condition and affairs to the Director of Trade and Commerce in the same manner and in the same form as similar insurance com-

panies organized under the laws of the State, on or before the first day of March in each year for the year ending on the preceding 30th of September. The Insurance Superintendent was given authority by the same act to investigate affairs of the foreign companies, such investigation to be at the expense of the company, and if he found the condition of any one unsound to close up the business of the company by application to the circuit court of the county in which it had its principal office. By the same act, each foreign company was required to pay \$30 for filing the charter, \$10 for filing the annual statement required, and \$2 for each certificate of authority for agents, and certain other fees of a similar character. Paragraphs 150, 152, 156, Cahill's Rev. Stat. Ill. 1925, ch. 73.

By the Act of June 28, 1919 (Cahill's Ill. Rev. Stat. 1925, ch. 73, sec. 79, p. 1390), it was provided that each non-resident corporation licensed and admitted to do an insurance business in the State should pay an annual state tax for the privilege of so doing, equal to 2 per centum of the gross amount of premiums received during the preceding calendar year on contracts covering risks within the State after certain reductions; that the tax should be in lieu of all license fees or privilege or occupation taxes levied or assessed by any municipality in the State, and that no municipality should impose any license fee, privilege or occupation tax upon such corporation for the privilege of doing an insurance business therein, but this should not be construed to prohibit the levy and collection of any state, county or municipal taxes upon the real and personal property of such corporations, or the levying and collection of taxes authorized by section 30 above quoted.

By section 12 of the same act (Cahill's Ill. Rev. Stat., ch. 73, sec. 90, p. 1391) it was provided that if any corporation should fail or neglect to make any report, or to refuse to pay any tax assessment within thirty days after the same became due, the Department of Trade and Commerce should have power to revoke its license to transact the business of insurance in the State, or to suspend it until the reports were filed or the taxes paid.

The complainant insurance company complied with the requirements of section 22 and other unrepealed sections of the Act of 1869 and paid the 2 per cent. tax on its premiums received as provided by the Act of 1919.

By the General Revenue Act of Illinois, in force since February 25, 1898 (Cahill's Rev. Stat. 1925, ch. 120, sec. 329, p. 2042), per-

sonal property is to be valued at its fair cash value, which value is to be set down in one column to be headed "Full Value", and one-half part thereof is to be ascertained and set down in another column headed "Assessed Value". The one-half value of all the property so ascertained and set down is to be the value for all purposes of taxation. It is further stipulated in this case and found by the trial court that for the year 1923, and for many years prior thereto, there has been what is called an equalization which systematically and intentionally reduces the amount set down in the column headed "Full Value" to not more than 60 per cent. of the actual market value of the personal property returned and by further reducing this by 50 per cent. to make the assessed value in accord with the statute, the tax is collected only on 30 per cent. of the full value.

This suit presents the question of the validity of the assessment made by taxing officers under section 30 for the year 1922. The Supreme Court of Illinois, in *People v. Barrett*, 309 Ill. 53, in an opinion announced June 20, 1923, near the close of the year for which the assessment of 1922 was made, held that the tax under section 30 was an occupation tax and that no reduction should be permitted to foreign insurance companies in the assessment for taxation of their annual net receipts. The Superior Court found that the actual amount of net cash receipts of the complainant company was \$90,824, less by \$45,000 than the amount reported by the Board of Review, so that its decree forbade the collection of more than \$7,184.18, instead of \$10,678.50, for which the warrant had issued, but denied further relief. The complainant insisted that under the previous practice and proper construction of section 30 as a property tax with due equalization and debasement the tax assessed should have been \$2,155.24, and that this, if anything, is all that should be collected from it. The Supreme Court by a divided court, three judges dissenting, affirmed the decree of the Superior Court. *Hanover Fire Insurance Co. v. Carr*, 317 Ill. 366.

The petitioner is an insurance corporation organized under the laws of the State of New York. By its charter it is authorized to do a business of insurance against the hazard of fire, marine perils, inland navigation, tornado, theft, explosion, property damage to automobiles and other property by collision, crop insurance and other similar lines of insurance against specified hazards. There are in Illinois domestic insurance companies which do business in all

of such risks. In *Fidelity & Casualty Company v. Board of Review*, 264 Ill. 11, decided in 1914, the Supreme Court held that the only insurance companies whose receipts come within section 30 are foreign fire, marine and inland navigation insurance companies doing business in the State. And if they do business in the other hazards above stated, as the complainant and petitioner is authorized to do, then they must pay taxes on their net receipts made not only from fire, marine and inland navigation company business but also from the other hazards.

The situation then is that a foreign fire, marine and inland navigation insurance company like the petitioner must pay at a rate per centum equivalent to that imposed on personal property a tax on the cash amount or 100 per cent. of its net receipts from all its insurance business. A domestic fire, marine, and inland navigation insurance company pays no tax on its net receipts from any kind of insurance. Both pay on their personal property other than net receipts as of a fixed date in each year on an assessment of 30 per cent. of its full value.

The Supreme Court of Illinois for many years held the payment of a tax on the net receipts was a tax on personal property. *Walker v. Springfield*, 94 Ill. 364; *City of Chicago v. James*, 114 Ill. 479; *Chicago v. Phoenix Insurance Company*, 126 Ill. 276; *National Fire Insurance Company v. Hanberg*, 215 Ill. 378; *People v. Cosmopolitan Fire Insurance Company*, 246 Ill. 442. The net receipts were the gross receipts from each agency after the operating expenses had been deducted. The losses from fire and other risks assumed were not deducted. *National Fire Insurance Co. v. Hanberg*, 215 Ill. 378. It is quite apparent from reading these cases that in practice the net receipts were treated as personal property and their assessment was by equalization and debasement reduced from full value as all other personal property, until the decisions in *People v. Kent*, 300 Ill. 324 (1921) and in *People v. Barrett*, 309 Ill. 53.

The general principle upon which the Supreme Court of Illinois holds the tax complained of herein to be valid is that the payment of it is part of the condition which the petitioner as a foreign insurance company is obliged to perform in order to maintain and retain its right to do business in the State. It was settled in the *Bank of Augusta v. Earle*, 13 Pet. 519, *Paul v. Virginia*, 8 Wall. 168, *Ducat v. Chicago*, 10 Wall. 410, and *Horn Silver Mining*

Company v. New York, 143 U. S. 305, that foreign corporations can not do business in a State except by the consent of the State; that the State may exclude them arbitrarily or impose such conditions as it will upon their engaging in business within its jurisdiction. But there is a very important qualification to this power of the State, the recognition and enforcement of which are shown in a number of decisions of recent years. That qualification is that the State may not exact as a condition of the corporation's engaging in business within its limits that its rights secured to it by the Constitution of the United States may be infringed. This is illustrated in respect to the breach of the commerce clause of the Constitution by the cases of *Sioux Remedy Company v. Cope*, 235 U. S. 197, 203 and *Looney v. Crane Company*, 245 U. S. 178, 188. It is illustrated in cases in which a provision of a state law revoking the license of a foreign corporation for exercising its constitutional right to remove suits brought against them from the state courts to the federal courts has been held void; *Terral v. Burke Construction Company*, 257 U. S. 529; in cases in which the State has vainly attempted to subject foreign corporations to a payment of a tax which is a tax not only on the property of the corporation in the State but also on its property without the State, in violation of the due process clause of the Fourteenth Amendment, *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1; *St. Louis Cotton Compress Company v. Arkansas*, 260 U. S. 346; and finally in cases of a class to which it is contended the present case belongs, where a tax or license law operates to deny to the foreign corporation the equal protection of the laws, *Southern Railway Co. v. Greene*, 216 U. S. 400; *Air Way Corporation v. Day*, 266 U. S. 71. In the former of these last two cases a railway corporation of another State had come into Alabama and secured a license to do business therein as an intrastate railway and in course of that business had acquired in the State property of a fixed and permanent nature upon which it had paid all the taxes levied by the State. It was held that a new and additional franchise tax for the privilege of doing business within the State, not imposed upon domestic corporations doing business in the State of the same character, violated the equal protection clause. In *Air Way Corporation v. Day*, a corporation of Delaware had much or all of its property in Ohio where it was duly authorized to do business. Thereafter a law of Ohio imposed five cents a share upon a certain proportion of non-par shares authorized by the

State of Delaware which the court found to be arbitrary and not based on a classification of foreign corporations having any reasonable basis.

In the present case there is no such permanent investment in the State of Illinois as there was in the *Greene* case in Alabama, but the averments of the bill show that the complainant has from year to year secured renewal of its license in the State of Illinois, and has through many years past built up a large good will in the State of Illinois and has associated with it a large number of agents in the various counties of the State, whose connection with it has resulted in a large and profitable business to the complainant, and that it has large numbers of records containing information respecting its policy holders, the character and nature of their policies and other records, the value of all of which would be destroyed if excluded from the State by a denial of the equal protection of the laws. In the *Greene* case the license was indefinite. In this case it must be renewed from year to year, but the principle is the same that pending the period of business permitted by the State, the State must not enforce against its licensees unconstitutional burdens.

It is insisted that we must accept the construction of section 30 by the State Supreme Court and as the tax levied is sustained by its construction and has been held by the court to be an indispensable condition upon which the petitioner may continue to do business in Illinois, this Court is bound by both those conclusions.

It is true that the interpretation put upon such a tax law of a state by its Supreme Court is binding upon this Court as to its meaning, but it is not true that this Court in accepting the meaning thus given may not exercise its independent judgment in determining whether with the meaning given, its effect would not involve a violation of the Federal Constitution. As said by this Court in *St. Louis Southwestern Railway v. Arkansas*, 235 U. S. 350, at page 362, where the question was whether a tax law violated the equal protection clause of the Fourteenth Amendment:

"Upon the mere question of construction we are of course concluded by the decision of the state court of last resort. But when the question is whether a tax imposed by a State deprives a party of rights secured by the Federal Constitution, the decision is not dependent upon the form in which the taxing scheme is cast, nor upon the characterization of that scheme as adopted by the state court. We must regard the substance rather than the form,

and the controlling test is to be found in the operation and effect of the law as applied and enforced by the State."

This view has been upheld in many cases. *Western Union Telegraph Company v. Kansas*, 216 U. S. 1, 27; *Ludwig v. Western Union Telegraph Company*, 216 U. S. 146; *Sioux Remedy Company v. Cope*, 235 U. S. 197; *St. Louis Cotton Compress Company v. Arkansas*, 260 U. S. 346. In the last case the question was whether a foreign corporation doing business in Arkansas could be required by a law of the State to pay a so-called occupation tax upon premiums paid by it to insurance companies not doing business in Arkansas for insurance upon property of the corporation in Arkansas, the policies having been issued and accepted outside of Arkansas. This Court held the tax invalid as a violation of the Fourteenth Amendment. In reaching this conclusion, this Court said (p. 348):

"The Supreme Court justified the imposition as an occupation tax—that is, as we understand it, a tax upon the occupation of the defendant. But this Court although bound by the construction that the Supreme Court may put upon the statute is not bound by the characterization of it so far as that characterization may bear upon the question of its constitutional effect."

In subjecting a law of the State which imposes a charge upon foreign corporations to the test whether such a charge violates the equal protection clause of the Fourteenth Amendment, a line has to be drawn between the burden imposed by the State for the license or privilege to do business in the State and the tax burden which, having secured the right to do business, the foreign corporation must share with all the corporations and other taxpayers of the State. With respect to the admission fee, so to speak, which the foreign corporation must pay to become a *quasi* citizen of the State and entitled to equal privileges with citizens of the State, the measure of the burden is in the discretion of the State and any inequality as between the foreign corporation and the domestic corporation in that regard does not come within the inhibition of the Fourteenth Amendment; but after its admission, the foreign corporation stands equal and is to be classified with domestic corporations of the same kind.

In this class of cases, therefore, the question of the application of the equal protection clause turns on the stage at which the foreign corporation is put on a level with domestic corporations in engaging in business within the State. To leave the determination

of such a question finally to a state court would be to deprive this Court of its independent judgment in determining whether a federal constitutional limitation has been infringed. While we may not question the meaning of the tax law as interpreted by the state court in the manner and effect in which it is to be enforced, we must re-examine the question passed upon by the state court as to whether the law complained of is a part of the condition upon which admission to do business of the State is permitted and is merely a regulating license by the State to protect the State and its citizens in dealing with such corporation, or whether it is a tax law for the purpose of securing contributions to the revenue of the State as they are made by other taxpayers of the State. Our power and duty in this regard must follow from our decisions, and while the exact question has not heretofore been considered, there can be no doubt that our conclusion finds its complete support in the analogies of other cases in which we have had to determine what our duty is in dealing with the alleged invalidity of state legislation. *Bailey v. Alabama*, 219 U. S. 219, 239; *Corn Products Co. v. Eddy*, 249 U. S. 427, 432; *Appleby v. New York* (June 1, 1926); *Truax v. Corrigan*, 257 U. S. 312, 324, 325. What, therefore, we have to decide here is whether the application of section 30 can be one of the conditions upon which the insurance company is admitted to do business in Illinois, or whether under the law of 1919 the authority granted by the Department of Trade and Commerce for which the company paid 2 per cent. of gross premiums received the previous year by it put it upon a level with domestic insurance companies doing business of the same character.

It is plain that compliance with section 30 is not a condition precedent to permission to do business in Illinois. The State Supreme Court concedes this, but its reasoning that payment of the tax under the section is a condition to its doing business in Illinois which may vary at the will of the State without regard to taxes on similar domestic corporations is shown by the following passages:

"The fact that a tax is a privilege tax does not necessarily require that it be paid as a condition precedent to entering the State. Such a condition, being precedent, could of course be met but once. However, the greatest financial benefit to such a company flows from the continuation of the privilege to do business. Compensation for that privilege should be based on the benefits actually derived from the business done under such privilege, and such com-

pensation must necessarily be assessed in some manner after the business is done and the benefits thereof received. Section 30 provides the method by which the amount of this compensation shall be determined and assessed." (p. 373.)

"Section 22 of the act relating to fire, marine and inland navigation insurance, aside from specifying certain requirements imposed upon foreign insurance companies, seeking to do business in this state and specifying what shall be necessary to secure the right of entry, further provides: 'Nor shall it be lawful for any agent or agents to act for any company or companies referred to in this section, directly or indirectly, in taking risks or transacting the business of fire and inland navigation insurance in this state without procuring annually from the Insurance Superintendent a certificate of authority stating that such company has complied with all the requisitions of this act which apply to such companies and the name of the attorney appointed to act for the company.' The provision of section 30 requiring the return of net receipts of this tax, are a part of the 'requisitions of this act.' It is evident, therefore, from the language in section 22 quoted, that before the appellant may continue in business in this state, its agent shall procure annually from the Insurance Superintendent of the State or his successor in law, a certificate showing that it has complied with the requirements of section 30 with reference to this tax. Such certificate can not be lawfully issued without such showing. This act provides no other means of collecting such tax and no reference is made for its collection." (p. 374.)

The Court then refers to another Act which imposes a penalty for violation of section 30 by placing risks or policies of indemnity upon property in any other manner than through its regularly authorized agents, and justifying a revocation of the license for a period of not less than ninety days and that it shall not be reissued until it appears that there is complete compliance with the laws of the State governing such companies and until it has been shown that all taxes and penalties and expenses due thereunder have been paid.

"It seems clear, therefore," says the Court (p. 375), "that this tax is levied as compensation for the privilege of continuing their business in the State.

While the Act of 1919 . . . imposes an annual state tax equal to two per cent. on the gross amount of the premiums received by any foreign insurance company during the preceding year, . . . that fact does not show that the tax imposed on the business of fire insurance by section 30 is not likewise a tax for the privilege of doing business. The Act of 1919 requires that the tax there levied be paid to the State. Section 30 requires that the tax

be apportioned among the State and the different municipalities of the situs of the agency. A valid reason is seen for this distribution of the tax. The foreign fire insurance company takes its net proceeds largely from the vicinity of its agencies and it is but just that it return to the municipality in which its agency is located something in lieu of the taxes that would otherwise be realized from such net receipts as are taken away."

The view of the Court seems to be that the constitutional necessity for equal application of the laws of the State to foreign and domestic corporations properly engaged in business is avoided if only the State provides that failure to comply with the laws during the period or at the end of the period for which the license runs justifies a revocation of the license pending the period, or a refusal to grant a new license for the following year. We do not think the State may thus relieve itself from granting the equal protection of its laws to a foreign company which has met the conditions precedent to its becoming a *quasi* domestic citizen. Of course at the end of the year for which the license has been granted, the State may in its discretion impose as conditions precedent for a renewed license past compliance with its valid laws; but that does not enable the State to make past compliance with section 30 a condition precedent to a renewal of the license, if as we find that section violates the Fourteenth Amendment, for, as already said, while a State may forbid a foreign corporation to do business within its jurisdiction, or to continue it, it may not do so by imposing on a corporation a sacrifice of its constitutional rights. We have said in *Cheney Bros. Co. v. Massachusetts*, 246 U. S. 147, and in *Kansas City, etc. Railroad Company v. Stiles*, 242 U. S. 111, 118, that a State does not surrender or abridge its power to change and revise its taxing system and tax rates by merely licensing or permitting a foreign corporation to engage in local business and acquire property within its limits, and that a State may impose a different rate of taxation upon a foreign corporation for the privilege of doing business within the State than it applies to its own corporations upon the franchise which the State grants them; but the decision in *Southern Railway Company v. Greene*, *supra*, shows that this power to change the tax imposed on a foreign corporation as a condition for the license of continuing business is not unlimited, and that any attempt in a renewal to vary the terms of the original license which, however indirectly, enforces a new condition upon the corporation and involves a deprivation of its Fed-

eral constitutional rights, can not be effective. The State in dealing with foreign corporations may properly and without discrimination as between them and domestic companies regulate the former by a provision that for a failure by them to comply with any valid law governing the conduct of their business in the State the license already granted may be revoked. That is a legitimate condition in the treatment of foreign companies which do not have property and home within the State. It is a police regulation. But the power thus to revoke a license for breach of a law can only be validly exercised, if the law be a constitutional one. By compliance with the valid conditions precedent, the foreign insurance company is put on a level with all other insurance companies of the same kind, domestic or foreign within the State, and tax laws made to apply after it has been so received into the State are to be considered laws enacted for the purpose of raising revenue for the State and must conform to the equal protection clause of the Fourteenth Amendment. This conclusion is not only in accord with our previous decisions but is sustained by the reasoning in a satisfactory judgment of the Court of Errors and Appeals of New Jersey. *Erie Railway Co. v. State*, 31 N. J. L. 531, 542, 543, 544.

We thus reach the question whether a tax imposed upon foreign fire, marine and inland navigation insurance companies on the net receipts of all their business, whether fire, marine, inland navigation or other risks, is a denial of the equal protection of the laws when domestic insurance companies pay no taxes on such net receipts. Under the previous decisions of the Supreme Court of Illinois, when the net receipts were treated as personal property and the assessment thereon as a personal property tax subjected to the same reductions for equalization and debasement, it might well have been said that there was no substantial inequality as between domestic corporations and foreign corporations, in that the net receipts were personal property acquired during the year and removed by foreign companies out of the State, and could be required justly to yield a tax fairly equivalent to that which the domestic companies would have to pay on all their personal property including their net receipts or what they were invested in. It was this view, doubtless, which led to the acquiescence by the State authorities and the foreign insurance companies in such a construction of section 30 and in the practice under it.

But an occupation tax imposed upon 100 per cent. of the net receipts of foreign insurance companies admitted to do business in Illinois is a heavy discrimination in favor of domestic insurance companies of the same class and in the same business which pay only a tax on the assessment of personal property at a valuation reduced to one-half of 60 per cent. of the full value of that property. It is a denial of the equal protection of the laws. *Sunday Lake Iron Co. v. Wakefield*, 247 U. S. 350, 352, 353; *Southern Ry. Co. v. Greene*, 216 U. S. 400. Analogous cases are many. *Cummings v. National Bank*, 101 U. S. 153; *Greene v. Louisville R. R. Co.*, 244 U. S. 499, 516; *Sioux City Bridge v. Dakota County*, 260 U. S. 441, 445; *Taylor v. L. & N. R. R.*, 88 Fed. 350; *L. & N. R. R. v. Bosworth*, 209 Fed. 380, 452; *Washington Water Power Co. v. Kootenai Co.*, 270 Fed. 369, 374.

One argument urged against our conclusion is that the relation of a foreign insurance company to the State which permits it to do business within its limits is contractual and that by coming into the State and engaging in business on the conditions imposed, it waives all constitutional restrictions and can not object to a condition or law regulating its obligations even though as a statute operating *in invitum* it may be in conflict with constitutional limitations. This argument can not prevail in view of the decisions of this Court in well considered cases. *Insurance Co. v. Morse*, 20 Wall. 445; *Western Union Telegraph Company v. Kansas*, 216 U. S. 1; *Terral v. Burke Construction Co.*, 257 U. S. 529; *Fidelity & Deposit Company v. Tafoya*, 270 U. S. 426; *Frost v. Railroad Commission*, June 7, 1926.

The judgment of the Supreme Court of Illinois must be reversed and the case remanded for further proceedings not inconsistent with this opinion.

A true copy.

Test:

Clerk, Supreme Court. U. S.